

1                                    **UNITED STATES DISTRICT COURT**  
2                                    **FOR THE DISTRICT OF NEW JERSEY**

3                                    **CIVIL ACTION NUMBER:**  
4                                    **ROOFER'S PENSION FUND,**  
5                                    **Individually and on Behalf**  
6                                    **of All Others Similarly**  
7                                    **Situated,**  
8                                    **2:16-cv-02805-JXN-LDW**  
9                                    **ORAL ARGUMENT**

10                                    **Plaintiffs,**  
11                                    **v.**  
12                                    **JOSEPH C. PAPA, et al,**  
13                                    **Defendants.**

14                                    **Martin Luther King Building & U.S. Courthouse**  
15                                    **50 Walnut Street**  
16                                    **Newark, New Jersey 07101**  
17                                    **Thursday, April 7, 2022**  
18                                    **Commencing at 10:03 a.m.**

19                                    **B E F O R E:**

20                                    **THE HONORABLE JULIEN XAVIER NEALS**  
21                                    **UNITED STATES DISTRICT JUDGE**

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ARGUMENT

PAGE

SUMMARY JUDGMENT/LOSS CAUSATION

BY MR. WAREHAM

7, 175

BY MR. HARDIMAN

50, 161

BY MR. BRODSKY

65, 166

BY MR. SILVERMAN

96, 182

BY MR. HARROD

139, 188

DAUBERT MOTIONS

BY MR. GRONER

191

BY MR. HARROD

199

1 (PROCEEDINGS held remotely before The Honorable JULIEN  
2 XAVIER NEALS, United States District Judge, and The Honorable  
3 LEDA DUNN WETTRE, United States Magistrate Judge, at 11:03  
4 a.m.)

5 THE COURTROOM DEPUTY: All rise, the Honorable Julien  
6 Xavier Neals presiding.

7 THE COURT: This is by far the fullest house I have  
8 seen since the pandemic started.

9 Please be seated.

10 Counsel, your appearances, please.

11 MR. SILVERMAN: Good morning, your Honor. Josh  
12 Silverman, of Pomerantz LLP on behalf of the plaintiffs.

13 MR. HARROD: Good Morning, your Honor. James Harrod,  
14 of Bernstein Litowitz Berger & Grossman, also for the  
15 plaintiffs.

16 MR. PRZYBYLOWSKI: Morning, your Honor, Thomas  
17 Przybylowski, from Pomerantz LLP on behalf of the plaintiffs.

18 MR. JENSEN: Good Morning, your Honor. Jesse Jensen  
19 from Bernstein Litowitz, on behalf of the plaintiffs.

20 MR. HIMMEL: Good Morning, your Honor. Michael  
21 Himmel, of Lowenstein Sandler, liaison counsel for the  
22 plaintiffs.

23 THE COURT: Good morning.

24 MR. WAREHAM: Good morning, your Honor. Jamie  
25 Wareham, from Fried Frank, with my partner James Anklam; my

1 partner Sam Groner; my colleague, Kate St. Romain, on behalf of  
2 Perrigo.

3 THE COURT: Good Morning.

4 MR. NAAR: Good Morning, your Honor. Alan Naar,  
5 Greenbaum Rowe Smith & Davis, also for Perrigo.

6 THE COURT: Good Morning.

7 MR. BRODSKY: Good morning, your Honor. Reed Brodsky,  
8 from Gibson Dunn on behalf of Joseph Papa as well.

9 MR. HARDIMAN: Good morning, your Honor. John  
10 Hardiman, of Sullivan & Cromwell. We represent Judy Brown.  
11 Michael Devlin is with me as well.

12 THE COURT: Good Morning.

13 Just by quick recap -- well, for housekeeping purposes,  
14 before you speak, if you could just identify yourself, because  
15 there's a number of you, and I know my court reporter has a  
16 good memory, but nobody's memory is that good.

17 If you're comfortable from counsel table, feel free.  
18 You may just have to adjust in terms of the microphone so the  
19 court reporter may, at times, ask you to get closer to the mic  
20 if there is trouble hearing. But also feel free to use the  
21 lectern if you're more comfortable at the lectern.

22 Just to recap, we have Perrigo's motion for summary  
23 judgment. Motion to exclude the expert testimony of Purcell  
24 Clark and Nye. Joseph C. Papa's motion for summary judgment.  
25 And Judy Brown's motion for summary judgment. I also note that

1 Perrigo also, again, has the initial filing.

2 Counsel, I know that we had received communication in  
3 terms of the time allotted for argument.

4 I'm going to leave it to you as to how you wanted to  
5 proceed in the order of how you wanted to address the motions.  
6 So as I would anticipate I would think that maybe Perrigo would  
7 be starting. What was the preference? Were you going to  
8 address the summary judgment and the exclusion motion together?

9 MR. WAREHAM: Your Honor, our preference would be to  
10 speak to the motion for summary judgment. Both the individual  
11 defendants and the company. And then have opposition to that  
12 motion. A little bit of rebuttal.

13 And then have a clean break between that motion and the  
14 Daubert motions on the three experts.

15 THE COURT: That's fine.

16 MR. WAREHAM: Thank you, your Honor.

17 THE COURT: That's fine.

18 So the floor is yours.

19 MR. WAREHAM: I'm old, your Honor, so I will use the  
20 lectern.

21 Good morning, may it please the court. My name is Jamie  
22 Wareham from Fried Frank on behalf of Perrigo. My partner Sam  
23 Groner and I will today present on behalf of the defendants, at  
24 sometimes all defendants, and other times, just for Perrigo.

25 I want to begin by thanking Judge Wettre for her

1 important and rather remarkable efforts and assistance to  
2 getting this case to where it could now be dismissed.

3 With the Court's indulgence I will go through falsity,  
4 scienter, and loss causation; the three elements of 10b-5 that  
5 the plaintiffs have failed to meet.

6 As logic dictates that then my colleagues from Gibson  
7 Dunn and Sullivan & Cromwell will address similar issues with  
8 respect to scienter and falsity for their individual clients.

9 And then as I said, I would like to have maybe a few  
10 minutes of rebuttal.

11 We propose, your Honor, to -- after the summary judgment  
12 motion -- have Mr. Groner present on the question of exclusion  
13 of the three experts.

14 So plaintiffs, your Honor, bring claims against Perrigo  
15 under the Exchange Act 10b-5 and under 14(e).

16 Both claims fail.

17 There are also tag-a-long 20A claims called control  
18 person claims, that also fail and you will hear about that from  
19 the individual defendants.

20 In July, your Honor, the Court substantially narrowed  
21 this case. Plaintiffs originally pled four independent  
22 theories and now only two remain. The first remaining theory  
23 is premised on the false notion that Perrigo engaged in  
24 collusive pricing with respect to competitors for six generic  
25 topical drugs, specified in the complaint.



1           In particular, plaintiffs claims the defendants intended  
2 to, and did defraud investors, by failing to disclose this  
3 supposed price-fixing scheme with respect to these individual  
4 drugs.

5           Now, Judge Arleo barely, your Honor, allowed this claim  
6 to proceed to discovery. She quotes, the scienter allegations  
7 related to the price-fixing scheme narrowly surpassed the bar  
8 for pleading scienter. Narrowly, your Honor. You will see now  
9 how widely they have failed.

10           Two years of intense, expensive, intervening discovery  
11 ably overseen by Judge Wettre revealed why Judge Arleo was so  
12 skeptical to begin with about these so-called price-fixing  
13 claims. They present no admissible evidence -- none -- that  
14 Perrigo was involved in a price-fixing scheme with respect to  
15 any drug, never mind the six in the complaint.

16           From the outside of this case, your Honor, what the  
17 plaintiffs really hoped was that the United States Department  
18 of Justice Criminal Division of the anti-trust section was  
19 going to bring charges against Perrigo or some of its  
20 employees.

21           They were simply *Waiting for Godot* and like the play,  
22 Godot never showed and Godot was not going to show. There are  
23 going to be no criminal charges that come out of the DOJ that  
24 have anything to do with respect to Perrigo's product.  
25 Frankly, your Honor, there is no admissible evidence that

1 anyone at Perrigo fixed prices of anything at any time.

2 Not just for generic Rx products, but for any kind of  
3 drugs. Of course, your Honor, neither DOJ nor any civil  
4 litigant has ever alleged, suggested, intimated that Mr. Papa  
5 or Ms. Brown did anything with respect to collusive pricing.

6 Plaintiff's second remaining theory is as infirm as the  
7 first. It's that Perrigo made misrepresentations and material  
8 omissions with scienter regarding success of Perrigo's  
9 then-present integration of Omega Pharma. Omega Pharma was a  
10 large European enterprise that Perrigo acquired on March 30,  
11 2015.

12 Plaintiffs seek to ward off dismissal by claiming in  
13 their amended complaint that they make allegations that it  
14 plainly does not make with respect to performance. They are  
15 trying to now amend their complaint through pleadings.

16 That's, of course, impermissible as a matter of law.  
17 They ask this Court to do it -- the Third Circuit has never  
18 done as well, your Honor, and that is to adopt the corporate  
19 scienter theory. They implicitly recognized that they have  
20 failed to prove, or allege sufficiently, scienter with respect  
21 to Mr. Brown, Ms. Brown, and Mr. Papa.

22 And they are now proceeding to ask this Court to do what  
23 the Third Circuit has refused to do. And plaintiffs finally,  
24 your Honor, mischaracterize true statements about Perrigo's  
25 actual integration of Omega shortly after the March 15th --

1 March 30, 2015 closing of the \$4 billion transaction.

2 Let me begin with the pricing claims, your Honor. I  
3 will put up an exhibit to my left and my right which, after all  
4 28 fact deposition transcripts have been scoured and after  
5 two-and-a-half million pages have been scoured, produced in  
6 discovery, I am going to show you a page that shows all the  
7 direct evidence of collusive pricing in this record.

8 The first time in my career, your Honor, I'm putting up  
9 this following page, a blank page. There is no direct evidence  
10 of collusion. None. There are no suggestions that there is  
11 evidence that requires no inferences, as *Baby Foods* requires  
12 that these -- to be direct evidence that must require no  
13 inference whatsoever. It must be, your Honor, a solemnized  
14 covenant to conspire under *Valspar*.

15 It's even stronger stated, your Honor, in *Intervest* case  
16 in which to prove anything approaching a collusion in a  
17 price-fixing case there must be a smoking gun. There are no  
18 smoking guns. There is nothing.

19 Plaintiffs allegations, rather, rest on the allegation  
20 that parallel price increases by Perrigo and some of its  
21 competitors for the market specified, that is topical, generic  
22 drugs, are, quote, strong indicia of collusion.

23 That assertion is incorrect. Not only as a matter of  
24 logic, but as a matter of law. Plaintiffs claims rest as they  
25 cannot now on supposition, on inference, on conjecture, on

1 speculation. We're beyond that phase, your Honor.

2 We are at the phase, your Honor, that the Court in the  
3 Third Circuit said, it is time for the plaintiffs to put up or  
4 shut up.

5 In *Brown v. Williamson*, your Honor, the Supreme Court  
6 held that parallel-pricing behavior, without more, does not,  
7 does not support collusion. This is especially true in  
8 naturally occurring oligopolistic markets. For example,  
9 certain markets in the pharmaceutical industry and, for  
10 example, this particular set of markets with respect to topical  
11 prescription generic drugs.

12 The Third Circuit, your Honor, has specifically rejected  
13 antitrust claims based on the parallel pricing theory for  
14 oligopolistic markets. It has done so twice in past seven  
15 years and three times since 1999. It's done so in *Baby Foods*,  
16 your Honor. It's done so in *Chocolate*, your Honor. And it's  
17 done so in *Valspar*.

18 The *Valspar*, *Chocolate*, *Baby Foods* case rendered the  
19 claims for price fixing dead on arrival, DOA. As the Third  
20 Circuit held in *Valspar*, your Honor, parallel-pricing is only  
21 probative of price fixing in cases involving nonoligopolistic  
22 markets, markets totally unlike the markets before the Court.  
23 There is no dispute that these markets are oligopolistic, even  
24 plaintiff's supposed expert, Mr. Clark, conceded as much during  
25 his deposition.

1           Of course, the hallmarks of any oligopolistic market are  
2   that there are very few competitors and second, that there are  
3   strong barriers to entry. Such as the case for topical generic  
4   drug products. These markets are classic examples of naturally  
5   occurring oligopolistic markets, both the specialized  
6   manufacturing requirements for these products, very  
7   complicated, very expensive. And the very rigorous FDA  
8   approval processes make it difficult for new companies to enter  
9   into this market.

10           Mr. Papa spoke repeatedly, as did others in the company,  
11   to investors and to the market and analysts about the fact that  
12   this type of strategy was central to the generic drug strategy  
13   of Perrigo. Namely, that they were going to be in products  
14   that had strong barriers to entry. And they had a competitive  
15   advantage there. They want to participate in oligopolistic  
16   markets and they told the market just as much.

17           Now in oligopolistic markets, the Third Circuit told  
18   Valspar that parallel pricing by competitors is, quote, your  
19   Honor, a necessary fact of life. It is what it is. We  
20   understand the plaintiffs don't seem to like oligopolistic  
21   markets. Tough. They are legal. In these markets, companies  
22   track and account for efforts of their own pricing decisions  
23   with competitors, and they look at what others are doing. And  
24   of course they do that lawfully.

25           This, quote, mutual awareness by competitors, which the

1 Third Circuit identified in *Baby Foods* and recognized in more  
2 detail in *Valspar*, leads to interdependent pricing. Even  
3 though each company's pricing decisions and pricing policies  
4 are made independently.

5         The bottom line here is, that the existence of parallel  
6 pricing increases in naturally occurring oligopolistic markets  
7 is typical. It is expected. It is normal. It is lawful. And  
8 that's what *Valspar* holds, your Honor. Because the drugs at  
9 issue here are sold in oligopolistic markets, the Third Circuit  
10 in *Valspar* requires plaintiffs to demonstrate parallel-pricing  
11 increases went beyond mere independence -- interdependence and  
12 were so usual that in the absence of advanced agreement, no  
13 reasonable forum would have engaged in them.

14         Plaintiffs made no such showing. They fail to prove  
15 anything beyond the mere existence of conscious  
16 parallel-pricing, the hallmark of an oligopolistic market.  
17 Lawful. Conscious. Parallel-pricing. As Judge Arleo  
18 explained in her July 2018 opinion, the Third Circuit considers  
19 a nonexclusive list of so-called plus factors to identify  
20 potential or illegal collusion as separate and distinct from  
21 legal parallel-pricing.

22         The factors are, quote, evidence that the defendants had  
23 a motive to enter into a conspiracy. Second, evidence that  
24 the defendants acted contrary to its own interest. And third,  
25 evidence implying a traditional conspiracy, an actual agreement

1 to fix prices.

2 Now, cases involving oligopolistic markets, unlike other  
3 type of markets, focus only on the third-plus factor and  
4 de-emphasize the first two factors. They do so precisely  
5 because these factors, according to *Valspar*, largely restate  
6 the phenomenon of interdependence, which is always present in  
7 oligopolistic markets. The third-plus factor is, thus, where  
8 the rubber meets the road, and it requires evidence of a  
9 traditional, classic, agreed-upon conspiracy, like discussed at  
10 the front end of this argument. Solemnized smoking guns.

11 The factor focuses on noneconomic evidence that there  
12 was an actual agreement among competitors not to compete. That  
13 is exactly what plaintiffs had to prove. That is what  
14 precisely what plaintiffs have failed to prove.

15 The only direct evidence at all related to the concept,  
16 the topic of collusion is evidence brought forth by the  
17 defendants, not by the plaintiffs. And during discovery, the  
18 plaintiffs deposed eight witnesses from the Rx division,  
19 current and former, from Perrigo. All eight unequivocally  
20 denied speaking to competitors about pricing in any way, shape,  
21 or form, never mind about price fixing.

22 During deposition of Perrigo's corporate designee, that  
23 designee testified it was Perrigo's policy not to speak to  
24 competitors about price issues. Each deponent from Rx  
25 reiterated that prohibition and their aware of that prohibition

1 and they stay to that course on that prohibition. In *Valspar*,  
2 *Chocolate*, and *Baby Foods*, the Third Circuit affirmed district  
3 court's grants of summary judgment to defendants where  
4 plaintiffs failed to prove the third plus factor, an agreement  
5 to fix prices existed, as these plaintiffs have failed to  
6 prove.

7 Now, lacking any direct evidence, a blank page, these  
8 plaintiffs try to take contortionist activities to take  
9 inadmissible evidence and circumstantial evidence and shoehorn  
10 it into a survival. Among these scattershot efforts,  
11 plaintiffs complain about Perrigo's attendance at trade  
12 association events and other social and business interactions  
13 with competitors. They argue that these events gave Perrigo  
14 opportunities to conspire.

15 As I mentioned earlier, your Honor, we're past the  
16 opportunity stage. We're at the smoking gun stage. We're at  
17 the put up or shut up stage. And we're not at the inference  
18 stage, we are long past that. The Third Circuit in *Valspar*  
19 made crystal clear that having an opportunity to conspire does  
20 not equal to actual conspiracy. The Third Circuit emphasized  
21 evidence that employees of competitors were in the same place  
22 at the same time without any evidence of specific conversations  
23 concerning an agreement to set prices, is sufficient to support  
24 an inference of collusion, never mind proof of collusion.

25 Perrigo has presented evidence that employees knew and



1 understood and stuck to the guidelines. Plaintiffs have  
2 produced no evidence that any employee ever discussed pricing  
3 with respect to products. I will get to one other point on  
4 that later with a deceased former employee about whether -- now  
5 ancient discussions, all the way back to 2010, 2011.

6           During discovery, Perrigo presented reams of admissible  
7 evidence that its employees had no discussions with competitors  
8 about any Perrigo products. In none of the 2 and a half  
9 million documents produced are there any emails between Perrigo  
10 and competitors about pricing. Perrigo's corporate  
11 representative testified that all interactions between  
12 competitors at industry conferences were entirely social and  
13 involved nothing specific. Each current or former Rx employee  
14 deposed by plaintiffs testified exactly the same. None  
15 prevaricated, none.

16           Plaintiffs impermissibly speculate that collusion may  
17 have somehow happened based on the mere proximity of price  
18 increases to trade shows and industry events. This is a silly  
19 argument, your Honor, because plaintiffs understand, and the  
20 record reflects, that the Perrigo employees attended more than  
21 50 trade shows during the three-year relevant period. 50. One  
22 event every three weeks. Thus, any price increase, any price  
23 decrease, any decision to maintain the price, would have to  
24 happen in close proximity to one of these 50 events.

25           Plaintiffs do not like oligopolistic markets and they

1 claim to or actually do not understand them either.

2 Let me briefly discuss, your Honor, plaintiff's claims  
3 about Perrigo's social and business interactions. They are  
4 very similar to the claims about trade shows and other  
5 competitor discussions.

6 Again, plaintiffs focus on the etherial opportunity to  
7 collude during these interactions, not on any admissible  
8 evidence than actual collusion took place. None. The record  
9 has provided only legitimate reasons for these parallel  
10 discussions unrelated to collusion. The Perrigo employees  
11 occasionally did interact with competitors, your Honor, as it  
12 happens in almost every industry in it America.

13 If you look at the sworn testimony, you will see that  
14 these conversations and communications had to do with small  
15 talk with former employees and former colleagues. Had to do  
16 with inquiries about potential job opportunities because there  
17 is some movement in the industry between the competitors, and  
18 it had to do with communications with respect to legitimate  
19 joint ventures and product development activities that happened  
20 sometimes between Perrigo and other makers of topical Rx  
21 generic drugs. Nothing more. Nothing less. Nothing about  
22 pricing. Nothing about price fixing. Nothing controversial at  
23 all.

24 The Third Circuit, your Honor, has addressed this very  
25 state of affairs. It did so in the *Tose v. First Pennsylvania*

1 Bank case where it made clear that opportunity alone does not  
2 create an inference of collusion. Never mind evidence of  
3 collusion, it is not even an inference. In toast, the Third  
4 Circuit affirmed summary judgment for defendants like these  
5 defendants and noted in the opinion that, quote, human  
6 experience does not support the inference of actual conspiracy  
7 from the basic fact of opportunity to conspire through social  
8 and business relationships. These allegations, circumstantial  
9 evidence, all amount to nothing.

10 Plaintiffs contort their effort to try to rely on this  
11 evidence to stave off summary judgment. And it continues, your  
12 Honor, when they complain about the size of the price increases  
13 that are involved in the products that they brought in their  
14 complaint, the six products. But the size of the product  
15 increase in oligopolistic markets demonstrates nothing, never  
16 mind collusion.

17 Plaintiffs pause that the price increases here are the  
18 different magnitude than price hikes that were discussed in the  
19 Third Circuit opinions of *Valspar*, *Chocolate*, and *Baby Foods*.  
20 But the holdings in those cases, your Honor, had nothing to do  
21 with the size of price increases. They didn't address that  
22 concept at all. So in comparison between though three cases  
23 in this case is pure speculation.

24 Moreover, your Honor, there are cases out there which  
25 we've cited in which even higher price increases in

1 oligopolistic markets have been deemed to be insubstantial to  
2 bring a claim for price fixing. We rely on, for example, your  
3 Honor, the Sixth Circuit case in Erie County, Ohio for that  
4 proposition. In sum, the deposition testimony and the document  
5 in your evidence completely devoid of facts supporting  
6 plaintiff's theory that Perrigo used trade means and social  
7 events as opportunities to even discuss, let alone fix prices  
8 for generic drugs.

9           They move even farther down the circumstantial evidence  
10 chain, your Honor, to what I think, maybe, is their silliest  
11 argument. The argument that monitoring of price increases and  
12 monitoring of price activity amongst competitors is somehow  
13 indicative of collusion.

14           After millions of dollars spent on discovery, including  
15 28 facts depositions, plaintiffs are still talking about  
16 implications because they can't find any proof. Again, we are  
17 beyond the implication phase. It is time to put up or shut up.

18           Of great importance is as a matter of law. It is untrue  
19 that monitoring of competitor's prices is illegal or unlawful  
20 or anyway suggestive of collusion. For example, your Honor, my  
21 partners and I pay close attention to what Milbank, Tweed does  
22 with respect to associate salaries, as does Mr. Hardiman's  
23 firm, Sullivan & Cromwell, as does Mr. Brodsky's firm Gibson  
24 Dunn. And Fried Frank, Gibson Dunn, Sullivan & Cromwell follow  
25 the leader and raise our associate prices to the same level.

1 We don't call each. We don't talk to each other. There is no  
2 collusion. It's -- we're monitoring our competitor's pricing  
3 and we are responding in nature and in kind.

4 Nothing unusual about that particularly in an  
5 oligopolistic market. And that's where single firms pricing  
6 actions will have a noticeable impact on the market prices of  
7 its rivals. That's the nature of the market. As the Third  
8 Circuit described in *Baby Foods*, it's just, quote, common sense  
9 to obtain as much information as possible about competitors  
10 pricing.

11 Plaintiffs complain about simple common sense. The  
12 Third Circuit recognizes in that oligopolistic markets people  
13 are going to pay close attention to price movements of their  
14 competitors.

15 Courts have even found that very intense efforts to  
16 monitor competitors's pricing does not undercut a finding of  
17 unilateral action of lawful action.

18 As plaintiffs admit in paragraph 70 of the amended  
19 complaint.

20 (Reporter Clarification.)

21 MR. WAREHAM: There are public records that track  
22 these prices and they are available for purchase. There are  
23 websites -- there are data sites that give people in the  
24 generic Rx topical drug market information about other people's  
25 prices. And that's not a surprise. And indeed, your Honor, in

1 Valspar, the Court recognized that efforts to gain pricing  
2 information is not probative of conspiracy, but rather, this is  
3 important, undermines conspiracy.

4         Why does it undermine conspiracy that people in  
5 oligopolistic market would track the other people's prices?  
6 Because if Perrigo were actually a participant in some kind of  
7 price fixing scheme, why would they need to monitor prices?  
8 Why would it need to ask customers for pricing information, you  
9 would also know. As the Valspar Court said, it would already  
10 know about the specifics of its own conspiracy. In sum,  
11 efforts to monitor prices belie conspiracy, they don't suggest  
12 one.

13         Now, even further down, inadmissible circumstantial  
14 evidence chain proceed the plaintiffs. Unable to put forth any  
15 direct or any circumstantial evidence, plaintiffs then turn  
16 toward inadmissible hearsay from other adversarial proceedings  
17 in effort to breathe life into their ill-fated claims.  
18 Plaintiffs attempt to rely on a civil complaint which is a mere  
19 set of allegations filed by various state agencies alleging  
20 anti-trust violations within the generic pharmaceutical  
21 industry.

22         This complaint is referred to an all-people's paper,  
23 your Honor, as the State AG complaint, and I will refer to it  
24 as that today. First, plaintiffs regurgitate allegations  
25 weighed out in the State AG complaint. All States with an AG

1 complaint, including those regarding communications between  
2 Perrigo and its competitors are, per se, flat out, inadmissible  
3 hearsay. Courts in the circuit have held squarely the  
4 complaints in other actions and the charges and allegations  
5 they contain are hearsay under the Federal Rule of Evidence.  
6 That is in the *TI construction* case, your Honor.

7           Plaintiffs cannot and do not dispute the fact that the  
8 State AG complaint is hearsay. Rather, they try to rely on an  
9 exception to the hearsay rule and contend that the State AG  
10 complaint is somehow admissible under the exception 803(8) of  
11 the Federal Rules of Evidence. 803(8) allows into to evidence  
12 records or statements of public officials in a civil case if  
13 they set out factual findings from illegally authorized  
14 investigation and are trustworthy. There are many reasons the  
15 State AG complaint fails under 803(8) and I will go through a  
16 few of them.

17           First, allegations of complaint are not factual  
18 findings. They are just not. They are merely allegations.  
19 And we cite the 2016 *Gumwood* case for that very clear  
20 proposition, your Honor.

21           Additionally, to qualify for an 803(8) hearsay  
22 exception, the statements must be trustworthy. But where a  
23 document is prepared in contemplation of litigation, there is  
24 always the risk of a lack of trustworthiness, a risk of bias.  
25 A complaint like the Stage AG complaint is a quintessential

1 example of a biased document.

2 It is, by its very nature, is not a product of fair  
3 adversarial discovery and lacks appropriate safeguards for  
4 defendants. We rely on a *WM Highfields* case for that  
5 proposition and those quotes are from that case, your Honor.

6 This is precisely why the case efforts to bring the  
7 State AG case into this case failed. It is unreliable. It is  
8 not trustworthy. It is adversarial. Plaintiffs seek to add  
9 some heft to a very weak argument by submitting a half a page,  
10 three-paragraph affidavit from a former Sandoz employee named  
11 Anthony Thomassy.

12 This effort, like other things I said twice before, your  
13 Honor, is silly. The Thomassy affidavit asserts that  
14 information attributed to Mr. Thomassy in the State AG  
15 complaint is true, but it's really of no moment. It has no  
16 consequence. In the offered affidavit Mr. Thomassy identifies  
17 himself as CW6. That usually stands in these cases for  
18 confidential witness No. 6. Plaintiffs then focus on  
19 allegation s in the State AG complaint related to the  
20 logistics, but not the substance, of communications between CW6  
21 and a deceased former employee who is in the sales department  
22 by the name of Tony Polman. I indicated I would address  
23 Mr. Polman and I will do that a few times here.

24 As noted in our papers, he is a disgraced former  
25 employee who took his own life on February 23, 2018, in



1 connection with criminal events totally unrelated to Perrigo.  
2 These allegations of communication between Mr. Thomassy and  
3 Mr. Polman took place in 2010 and 2011. That's 11 or 12 years  
4 ago, your Honor. It is six years before the class period in  
5 this case even began.

6 Moreover, all of the alleged communications involved in  
7 the State AG complaint had to do with drugs that are not in the  
8 case. They are just not in the case. Plaintiffs never amended  
9 the complaint, your Honor, bring the drugs in. They never  
10 amended the complaint, your Honor, to change the time of  
11 relevance in the class period.

12 No, Mr. Polman's alleged communication with CW6, or any  
13 other competitor, are not evidence of price collusion by  
14 Perrigo. And that's because Mr. Polman had no authority to set  
15 prices at Perrigo. The record on that is very, very clear.  
16 None of the documents that the plaintiffs cite is evidence of  
17 this supposed authority suggest this. They are contorted.  
18 They are speculative. They are misstated.

19 Indeed, the pricing authority at Perrigo rested with one  
20 single executive, a man by the name of John Wesolowski,  
21 W-E-S-O-L-O-W-S-K-I. Mr. Wesolowski reported to Mr. Douglas  
22 Boothe, B-O-O-T-H-E. And both men testified under oath that  
23 they did not know Mr. Polman was supposedly speaking with CW6,  
24 11 or 12 years ago, let alone any content of any discussions  
25 that Mr. Polman might have had 11 or 12 years ago.

1           And, of course, your Honor, the record is clear that  
2           there is no evidence that the CW6 fellow -- whoever it might  
3           be -- actually communicated with any executive at Perrigo that  
4           had pricing authority. And that's critical. Plaintiffs  
5           attempt to use Mr. Thomassy's affidavit to boot strap the  
6           allegations of the State AG complaint about alleged  
7           communications that are demonstrably, and as a matter of law,  
8           irrelevant to the issues of the case. We rely on this case,  
9           your Honor, which is quite important and I hope the Court can  
10          take time to review it, called *United Food v. Pilgrim's Pride*  
11          for the proposition that what Mr. Polman did or did not do 11  
12          or 12 years ago cannot save off dismissal.

13          Now, *United Food* is a very recent district court case,  
14          your Honor, and it could be found at 2022 Westlaw 684169. The  
15          *United Foods*, your Honor, the defendants had even pled guilty  
16          to earlier price fixing, but the *United Foods* court granted  
17          defendants' motion to dismiss where, quote, nearly all of the  
18          alleged conduct in the complaint related to bid-rigging schemes  
19          that preceded the class period. Much of it by many years.

20          Even if Perrigo had pled guilty 10 or 11 years ago to  
21          price fixing, which it did not, it would not be any evidence of  
22          this case and would have no bearing on this case, and this  
23          Court, like the *United Foods* court, should be free to dismiss  
24          the case at the pleadings stage.

25          Now, they continue down the slide of circumstantial

1 evidence -- in the lacking direct evidence -- when they try to  
2 survive a motion for summary judgment by raising statements  
3 made in a differed prosecution agreement between the DOJ and  
4 that same pharmaceutical company that Mr. Thomassy works for, a  
5 company named Sandoz, S-A-N-D-O-Z.

6 Plaintiffs do not and cannot dispute that the Sandoz  
7 differed prosecution agreement is, on its face, inadmissible  
8 hearsay. The law is clear. Deferred prosecution agreements  
9 are contractual agreements to resolve criminal investigations  
10 and are inadmissible hearsay. We offer the *In Re: Oil Spill*  
11 case, your Honor, in support of that proposition.

12 In an ill-conceived effort to bypass the hearsay rules,  
13 plaintiffs offer a one-page affidavit executed by a Sandoz  
14 employee, with no responsibility for sales or marketing of  
15 products, named Edward Stueck, S-T-U-E-C-K. Mr. Stueck's  
16 affidavit contains no substantive information about Perrigo,  
17 none.

18 Rather it states, quote, the company B in the DPA --  
19 that's deferred prosecution agreement -- and the attached  
20 statement of facts refers to Perrigo, and quote, in that DPA  
21 Sandoz admits, accepts, and acknowledges that the facts set  
22 forth in the statement of facts are true and accurate.

23 Now, the Stueck affidavit creates no issue of general --  
24 of genuine material fact that it is capable of surviving a  
25 motion for summary judgment, pardon me. Here's why.

1           The affidavit does not explain how Mr. Stueck has  
2   personal knowledge of any of the supposed communications  
3   between Sandoz and Perrigo, if there were any. Nor does it  
4   explain how Mr. Stueck came to understand company B was  
5   Perrigo. He is in the law department. He never sold anything.  
6   He never met anybody from Perrigo according to the record.  
7   There is no evidence that he had any conversations with anybody  
8   who had conversations with Perrigo.

9           Second, the plaintiffs don't deny that Stueck's supposed  
10   understanding that Perrigo was company B comes from some  
11   amorphous unknown person at DOJ, as Stueck has no personal  
12   knowledge. He is regurgitating what he is told by some unknown  
13   person at DOJ. Plaintiffs argue that hearsay statements can be  
14   considered on a motion for summary judgment if they are, quote,  
15   capable of being admissible at trial. But Stueck can never  
16   testify at trial. His statements would be, per se, hearsay and  
17   as a matter of fact, inadmissible.

18           Finally, further undercutting plaintiff's theory is that  
19   the Sandoz DPA relates only to one of the six drugs at issue in  
20   this case, the drug called desonide ointment. None of the  
21   Perrigo statements alleged in the complaint have anything to do  
22   with the desonide ointment. Nothing. No reference to desonide  
23   ointment by any of the speakers of the company, ever, on the  
24   record and none identified in the amended complaint.

25           Rather, the complaints -- allegations that they

1 challenge on the fraud theory address pricing strategies across  
2 all of Perrigo's portfolios, including the Rx unit.

3 Sales of desonide ointment are infinitesimal percentage  
4 of Perrigo sales. Desonide ointment were 1.09 percent of total  
5 product sales for the Rx unit in 2014. And, of course, the Rx  
6 unit is a small fraction of the multi-billion-dollar Perrigo.  
7 I started at the beginning, your Honor, by referencing the  
8 *Waiting for Godot* play and plaintiffs for years hoped --  
9 probably wished, probably even prayed -- that the DOJ would  
10 bring some sort of criminal action.

11 DOJ obtained, your Honor -- and certainly Judge Wettre  
12 knows this well -- discovery stays in this case five times in  
13 2019 to 2020. In the almost five years since plaintiffs filed  
14 their June 17th amended complaint, DOJ brought several cases  
15 against companies that, unlike Perrigo, actually broke the law.

16 But there is no evidence in this record of any effort  
17 by, or consideration of DOJ, to indict Perrigo or any of its  
18 executives. No evidence of discussions with antitrust  
19 authorities about potential DPAs, or prosecution of Perrigo.  
20 There is no tolling agreement with the DOJ. The statute of  
21 limitations has long expired. Let me repeat your Honor, like  
22 Godot, the DOJ ain't coming.

23 Now this is important for the following reasons. Judge  
24 Arleo's July 2018 opinion specifically recognized the weakness  
25 of plaintiff's collusive pricing claim. She allowed the claim

1 to proceed to discovery in large measure because of the  
2 pendency of this now-dead DOJ investigation. She wrote, quote,  
3 the mere fact that the investigation is somewhat probative of  
4 scienter.

5 I would say that the lack of an investigation is also  
6 probative of scienter the opposite way.

7 The lack of any DOJ action against Perrigo confirms that  
8 Judge Arleo's initial doubts about antitrust claims were well  
9 founded.

10 Now, not -- it is not dead enough already with respect  
11 to this collusion claims, but the record is full of evidence as  
12 to why the price increases the plaintiffs worry about were  
13 actually put in place. And plaintiffs have the burden to prove  
14 that there were no reasons -- only illegal reasons -- for the  
15 price increases and of course, they failed to meet that burden.

16 We as the defendants have demonstrated during discovery  
17 the actual noncollusive reasons for the price increases at  
18 issue here. And the processes by which Perrigo determined  
19 those price increases.

20 Perrigo's pricing determination is generally -- and in  
21 particular for the six products in this case -- were shown in  
22 discovery to be attributable to independent business reasons.  
23 We had in Perrigo an adversary pricing committee for the Rx  
24 business that studied and reviewed and suggested pricing  
25 decisions.

1           Perrigo's pricing committee analyzed many factors to  
2 determine whether to recommend increases or decreases or  
3 maintain pricing for each product. The recommendations were  
4 then made to Mr. Wesolowski and the ultimate authority -- the  
5 record is clear -- laid with Mr. Wesolowski. The pricing  
6 committee considered a lot of things in making the  
7 recommendations, including competitor dynamics, similar to the  
8 discussion we had about the law firms, what were other people  
9 doing. The pricing committee considered supply and demand,  
10 number of prescriptions being written, number of people in the  
11 market, changes in the dynamic for treatments.

12           It considered customer relations, could you raise prices  
13 and not irritate clients? Could you cut prices and cause  
14 damage to the market? It considered the number of  
15 prescriptions written. It continued -- considered the possible  
16 volume loss of sales if you took one step left or right on the  
17 pricing.

18           And, of course, it very heavily considered the cost of  
19 goods sold, because as I mentioned earlier, some of these goods  
20 are quite expensive to make and, indeed, the most expensive  
21 facility in the top of the drug market is a New York facility  
22 that is owned and operated by Perrigo.

23           Now, the depth of Perrigo's deliberations about price  
24 increases demonstrates the absence of an agreement to collude.  
25 Indeed, in the *Chocolate* case, your Honor, the Third Circuit

1 found that, quote, defendants extensive unilateral discussions  
2 reflect not considered action, but the exercise of independent  
3 business judgment and divergent pricing tactics driven by  
4 practical efforts to maximize competitive advantage.

5 There was no collusion. The prices were moved based on  
6 independent review and consideration by a committee with final  
7 decisions from the head of that business unit.

8 Now, Plaintiffs assert that emails and documents reflect  
9 that it frequently declined to bid or ceded business to  
10 competitors in order to maintain, quote, a fair share agreement  
11 with its competitors. This is, again, a distaste for the  
12 oligopolistic nature of this market and probably professed lack  
13 of understanding of the very same market.

14 Because courts have held that ceding business -- or  
15 customers is not necessarily against the company's self  
16 interest. And certainly not an indication of collusion.  
17 Indeed, the *Erie County, Ohio v. Morton Salt* case holds just  
18 that.

19 Of greater specificity in the Third Circuit, the *Valspar*  
20 court held that plaintiffs failed to meet their burden with  
21 very similar emails and very similar arguments. The emails in  
22 *Valspar* mentioned, quote, not undercutting a competitor's price  
23 increase. Quote, Letting other companies have market share  
24 and, quote, all major global players should be disciplined with  
25 pricing implementation.



1           The Third Circuit held in *Valspar* that those emails were  
2 evidence of nothing. They were not evidence of collusion at  
3 all. Rather, emails of this type showed competitors  
4 implementing pricing strategies in response to each,  
5 interdependent pricing, and a nonocclusive attempt to avoid  
6 market-wide profit decreases.

7           That's just standard for oligopolistic markets. And  
8 contrary to plaintiff's theory, this is exactly what occurred  
9 here; the exact same type of discussions and communications  
10 internally at Perrigo were already rejected in the *Valspar*  
11 case.

12           Now, they complain in the complaint -- and more likely  
13 and more often in their papers -- about broad statements having  
14 to do with the competitive nature of the market and they claim  
15 in words and substance that those were untrue statements.

16           Now, even if plaintiffs could somehow prove that Perrigo  
17 agreed to fix the prices for certain generic drugs, and of  
18 course they cannot, they have only put at issue very broad  
19 statements about the competitiveness of the general market in  
20 which Perrigo operated. And these statements were all  
21 demonstratively true on this well-developed record. And of  
22 course, true statements cannot sustain securities fraud  
23 liability at any stage. Particularly, the summary judgment  
24 stage.

25           Plaintiffs do not allege a single challenged Perrigo

1 statement mentioning or in any way alluding to any of the six  
2 products actually in the case. Perrigo marketed approximately  
3 800 generic prescription products, your Honor, across 1400  
4 SKUs. Perrigo sold products to at least 150 different  
5 customers and competed with more than 90 different competitors.

6 Plaintiffs have offered no evidence that the markets for  
7 any of Perrigo's hundreds of other generic prescription  
8 products were not competitive. Plaintiffs failed to understand  
9 or pretend not to understand the fundamental features of  
10 oligopolistic markets like the market for topical prescription  
11 drugs.

12 Your Honor, here is the net/net regarding the collusion  
13 claims. The parties have spent a majority of their summary  
14 judgment papers briefing these issues. Having done so, it is  
15 clear that plaintiffs have not met their burden of proof to  
16 show that a triable issue of fact remains. They have not even  
17 come close. We've gone through extensive and massively  
18 expensive discovery, spanning multiple years. Plaintiffs have  
19 found no evidence of actual collusion. None.

20 We have distilled plaintiff's alleged circumstantial  
21 evidence of collusion and the law discrediting it, your Honor,  
22 into a single demonstrative chart that takes their theories and  
23 summarizes some of the cases I reported and discussed and put  
24 it in one little demonstrative to help the Court post the  
25 hearing. And I would like to have my colleague -- permission

1 for my colleague to approach, to present that to the Court, and  
2 of course, to distribute copies to the counsel for the  
3 plaintiffs and for the other defendants as well.

4 THE COURT: Thank you, Counsel. Yes.

5 MR. WAREHAM: In some, what the plaintiffs complain  
6 about is nothing more than common behavior found in  
7 oligopolistic markets. And, your Honor, case law and logic  
8 refute plaintiff's attempts to head to trial on such a spartan  
9 record.

10 Now, I'm going to turn to the second surviving theory,  
11 which is the one that centers on the disclosures around the  
12 then current integration between Omega, which was a  
13 European-owned drug company that did business in 39 countries,  
14 and Perrigo. That's the deal that closed, your Honor, on March  
15 30, 2015.

16 In the Court's July 2018 ruling on a motion to dismiss,  
17 Judge Arleo permitted plaintiffs to proceed only on a narrow  
18 category of alleged misstatements or omissions related to the  
19 then present success of that very same integration. The Court  
20 correctly dismissed four working statements protected under  
21 the Private Securities Litigation Reform Act -- Private  
22 Securities Litigation Reform Act, safe harbor, and claims based  
23 on Omega's under performance within four specific geographic  
24 markets. And the Court held that the complaint failed to  
25 adequately plead those claims.

1 With respect to Omega, plaintiff challenge statements  
2 made by defendants were made between April 21, 2015, and  
3 January 5, 2016.

4 But none of those statements were false or misleading  
5 and none were made with the intent to defraud. I will discuss  
6 these points rather generally and my colleagues at Gibson Dunn  
7 and Sullivan & Cromwell will go more specifically into those  
8 failures.

9 First, plaintiffs take issue with statements concerning  
10 whether Omega acquisition was accretive to Perrigo's growth  
11 rate. Now, the record reflects very clearly that the Omega  
12 transaction was, indeed, accretive and it was accretive from  
13 day one. Thus, plaintiffs cannot get over the hump with  
14 respect to the truth of those statements. They are not false.  
15 They are true.

16 The accretive nature of Omega is illustrated by Omega's  
17 stand-alone value as a multibillion dollar company already  
18 participating in the European marketplace, where Perrigo at the  
19 time essentially had no real presence.

20 When Perrigo announced this results, your Honor, for the  
21 period ending June 2015, the very first quarter after the  
22 closing of the acquisition of Omega by Perrigo, they reported  
23 34 percent top-line growth. 34 percent top-line growth. That  
24 was driven primarily by the addition of Omega to the Perrigo  
25 family. It defies common sense to argue that the Omega

1 transaction was not accretive.

2 And, your Honor, public companies often do  
3 non-accretive, so-called diluted deals. They buy companies  
4 that require long times of growth, lots of cap backs, lots of  
5 investment, lots of patience, but that's not the type of  
6 transaction that Mr. Papa entered into here. He enter into  
7 a day one accretive transaction, and that's clear as a bell.

8 Now, the plaintiffs also allege that defendants failed  
9 to adequately disclose that there were serious impediments to  
10 Perrigo's integration of Omega, and these allegations lacked  
11 evidentiary support. They turn on supposition, on speculation,  
12 on contortions.

13 Now, the first of these challenged statements about the  
14 integration and its lack of success was made 22 days after the  
15 acquisition closed on April 21, 2015. It's no surprise that at  
16 that point there was no evidence of any serious impediment to  
17 integration because it was in its infancy. A recent decision  
18 by the Seventh Circuit, your Honor, which came down after  
19 briefing was completed in this case is of significant value to  
20 the Court's ability to resolve this case to dismiss this case.

21 In *City of Taylor Police and Fire Retirement Systems v.*  
22 *Zebra Technology Corporation*, the Seventh Circuit affirmed the  
23 dismissal of a securities case that alleged that a corporation  
24 had, quote, defrauded investors by making bad predictions  
25 during an integration process. That case was decided on August

1 10, 2021 and it could be found, your Honor, at 8F. 4th 592.

2 In Zebra the plaintiffs allege that the defendants  
3 statements in March of 2015 that integration was progressing as  
4 planned relies in light of defendants' later statements that  
5 acknowledge greater than expected complexities with certain  
6 aspects of integration. In other words, these statements  
7 talked about in the Zebra case are very, very similar to the  
8 statements that plaintiffs complain about here.

9 In a unanimous decision, the Seventh Circuit explained  
10 that plaintiffs could not show scienter because the most  
11 reasonable inference under the circumstances was that more  
12 information became available to executives as integration  
13 progressed. How could you take things you learn in 2016 and  
14 have those things impact your state of mind in 2015? You  
15 can't.

16 Our case is really quite similar to the Seventh Circuit  
17 case. The statements made just after the closing of Omega that  
18 it was pleased its with initial integration projects were true  
19 at the time and they were most certainly not made with the  
20 intent to defraud.

21 Numerous cases, your Honor, since this briefing process  
22 was completed have shed a lot of doubt on this whole concept of  
23 integration and whether it ought to be something that is  
24 actionable going forward. The case law is different now than  
25 it was when Judge Arleo made her decision to barely allow the

1 integration claim to sneak over the line and to get to  
2 discovery.

3 For example, in the *In Re: Ferrellgas --*  
4 *F-E-R-R-E-L-L-G-A-S -- Partners case, Ferrellgas Partners case*  
5 which would be found at 2018 Westlaw 2081859, the Court held  
6 that a company's integration-relate statements cannot give rise  
7 to a securities fraud claim because, quote, Integration is far  
8 too loose an uncertain term on which I wish to premise a claim  
9 of the securities fraud. I'm not convinced at all that that  
10 case been out there for Judge Arleo to review we would be here  
11 today at all. And there were other cases since this briefing  
12 was completed that similarly kind of put shade on, if that's  
13 the right phrase, on this whole concept of using amorphous  
14 concept of integration to proceed in the securities fraud case.

15 In the *Friedman v. Endo* case at 218 Westlaw 446 189, and  
16 also in the *Steamfitters Industry Pension Fund* case at 2019  
17 Westlaw 189, 0764, the courts are really starting to move  
18 towards eliminating and calling basically anything about  
19 integration inactionable, eliminating integration from the  
20 jurisprudence of securities fraud.

21 Now, plaintiffs also challenged a number of statements  
22 as misleading for failing to disclose supposed difficulties  
23 realizing potential revenue synergies arising from the Omega  
24 acquisition because of, quote, EU regulations, European Union  
25 regulations. There is absolutely zero evidence in the record

1 substantiating any problems with respect to EU regulations at  
2 Perrigo after the acquisition of Omega. None.

3 To the contrary, the documents and testimony demonstrate  
4 conclusively that various teams at Perrigo and Omega were  
5 collaborating effectively to identify and to analyze  
6 opportunities to sell Perrigo products in Europe through  
7 Omega's distribution channelled and to sell Omega's product in  
8 the United States through Perrigo's distribution channels.

9 In the amended complaint, your Honor, the plaintiffs  
10 relied on alleged statements, and when I say alleged, you will  
11 hear why in a minute, from a former employ named Christine  
12 Kincaid, K-I-N-C-A-I-D, to barely sneak over the line, your  
13 Honor, remember, your Honor. So Judge Arleo looks at these  
14 allegations from this woman, Christine Kincaid, and she allows  
15 barely this issue of Omega integration to move to the discovery  
16 stage.

17 And Judge Arleo specifically mentioned her when she  
18 sustained the count. And she says, quote, The plaintiffs  
19 relied heavy on the information given by Christine Kincaid. We  
20 are going to learn a little bit more about Christine Kincaid in  
21 a second.

22 She tells under oath a wildly different story than her  
23 alleged version of the truth is in the amended complaint. And  
24 she basically guts and debunks all of the plaintiff's  
25 allegations with respect to EU, this, integration, that. She,



1 of course, had been an employee, your Honor, for all of four  
2 months in Perrigo.

3 Now, the plaintiffs -- putting up a screen on the  
4 screen. It's going to go up here as well? Just there? Okay.

5 On the slide, we memorialize the plaintiff's allegation  
6 that Ms. Kincaid reported directly to the C-Suite of executive  
7 of the company. That's flat out false. She didn't report to  
8 the executive, to Mr. Papa. She didn't report to Ms. Brown.  
9 In fact, the record is that she never had any communications  
10 with Mr. Papa. She maybe ran into Ms. Brown someplace  
11 in the hallway, but she never was present when the decisions  
12 were made on integration matters, and she did not interact with  
13 Mr. Papa at all. And she did not interact with Mr. Papa and  
14 Ms. Brown on integration.

15 We really don't know what knowledge the plaintiffs had  
16 about Ms. Kincaid when they put these statements which were  
17 refuted by her under-oath testimony. Now, in the amended  
18 complaint, they attribute to Ms. Kincaid allegations that there  
19 were no integration issues and major integration impediments  
20 related to the acquisition of Omega.

21 This allegation, your Honor, is also just flat  
22 demonstratively false. Ms. Kincaid stated under oath that she  
23 did not hear that things were going wrong with the integration  
24 of Omega. She heard nothing about it. And we put up the  
25 allegation of the complaint on this exhibit and the truth.

1           Now, I alluded earlier to this EU regulation issue,  
2       which was important, clearly, to Judge Arleo. The amended  
3       complaint attributes to Ms. Kincaid the supposed fact that EU  
4       regulations would make it difficult to replace Omega's EU  
5       suppliers with Perrigo's U.S.-based supply chain.

6           I don't often say in open Court this is false, but this  
7       is false. During her deposition, Ms. Kincaid absolutely  
8       disavowed discussing revenue synergies or supply chain  
9       synergies, including implications of Omega switching from  
10      EU-based suppliers to Perrigo's U.S.-based suppliers with  
11      anybody but Perrigo at any time, never mind anybody speaking to  
12      the market.

13          Now, Ms. Kincaid's true testimony as opposed to the  
14      misleading representations in the amended complaint make it  
15      abundantly clear that the plaintiffs have failed to  
16      substantiate their allegations of, quote, serious present  
17      problems with integration.

18          Recognizing implicitly that they had failed to prove  
19      scienter, intent, knowledge, with respect to Mr. Papa or  
20      Ms. Brown, the plaintiffs then go down the chain of pure  
21      supposition and they ask you to adopt the corporate scienter  
22      doctrine which the Third Circuit has never adopted. They don't  
23      dispute the fact that it's never adopted, but they ask you to  
24      get out in the future and to be Nostradamus and predict that  
25      they will some day, for some reason, somehow.

1           Now, the Court had opportunity as recently as August  
2 2021, again, after the briefing was completed in this case, to  
3 decide whether it as the Third Circuit would adopt a corporate  
4 scienter doctrine. And it declined again in 2021 to adopt that  
5 doctrine.

6           In any event, even if their Nostradamus predictions are  
7 correct, and if the Third Circuit were to adopt some variation  
8 of the corporate scienter doctrine some day for some reason, it  
9 would not apply here because that doctrine requires a  
10 connection between the person who acted with scienter and the  
11 statements at issue. Here plaintiffs have demonstrated no  
12 connection between anyone other than Ms. Brown and Mr. Papa for  
13 whom there is no scienter to the statements they challenge in  
14 the amended complaint.

15           Final point with respect to the main argument. The  
16 failures to meet the loss causation burden that the *Dura* case  
17 in the Supreme Court -- D-U-R-A -- mandates that they must  
18 meet.

19           Start with the easiest one. The 14(e) claim. The 14(e)  
20 claim is dead on arrival. Dead as a door nail. The plaintiffs  
21 claim that they lost opportunity of a successful tender offer  
22 by Mylan not that they had any actual out-of-pocket damages.

23           So their claims under 14(e) turn exclusively on the  
24 supposition that the Mylan transaction would have gone forward  
25 and if they would have gotten the so-called benefit of that.

1 But they must meet a standard they have not met. They must  
2 show that those damages are not wholly speculative. And that's  
3 what the law requires.

4 Here, had the alleged concealed facts been disclosed, it  
5 is wholly speculative whether the plaintiffs would have reaped  
6 the benefit of any tender offer to begin with. That's because  
7 plaintiffs theory of loss rests on the rather irrational and  
8 internally inconsistent premise that disclosure of the alleged  
9 concealed facts would have had an impact on a decision by  
10 Perrigo shareholders whether to tender their shares, but  
11 somehow would have had no impact on the bidder, no impact  
12 whatsoever on Mylan's decision, whether to pay anything at all  
13 or certainly not the price that they put forward.

14 And so if you don't have a -- if the transsection itself  
15 is wholly speculative, the damages are wholly speculative and  
16 14(e) must fail under loss causation.

17 Now, plaintiffs 14(e) claims assume Mylan would have  
18 offered the very same tender price it did, even after Perrigo  
19 had disclosed the so-called cleansing announcements we talked  
20 about with respect to Omega and generic topical drugs. The  
21 plaintiffs claim that the damage to them -- with respect to  
22 those claims -- equals \$63 a share. So that's their own  
23 theory.

24 It's wrong for lots of reasons, but why would a company  
25 worth \$63 a share get the same price from Mylan, less a share,

1 get the same price from Mylan that the company worth \$63 more a  
2 share because was the truth was withheld. It makes no sense.

3 Absolutely, Mylan with a bare minimum have offered a  
4 lower price per share. How much? Who knows. I just can't  
5 speculate.

6 Far more likely, Mylan would have withdrawn the bid if  
7 the supposed fraudulent things were brought to their attention.  
8 And, of course, more important than anything else is plaintiffs  
9 have no evidence to the contrary.

10 Now, to try to bootstrap this argument -- bolster this  
11 rather illogical argument about Mylan would have gone forward  
12 with the deal had they known the truth, but the shareholders  
13 would not have -- it's internally inconsistent.

14 And they say, though however, your Honor, that the  
15 original tender offer from Mylan was legally binding and, thus,  
16 that's their proof that Mylan would indeed have paid that full  
17 offer, even though the company was worth at least \$63 a share  
18 less, if the truth had been known.

19 The plaintiffs cite Mylan's April 24, 2000 offer --  
20 April 24, 2015 offer -- which is Exhibit 292 -- for that  
21 proposition. But we can read. We've got the smart kids over  
22 here. We can read the Mylan tender offer and it's not  
23 nonbinding. Not even close to nonbinding. If the Court were  
24 to study page 10 of that document, there is a list of  
25 conditions to that offer.

1           And on page 14, Mylan makes it clear that its offer was  
2 contingent upon, quote, Mylan not having discovered that any  
3 financial, business, or other publicly disclosed information  
4 concerning the Perrigo group was materially misleading,  
5 contains a material misrepresentation of fact, or omits the  
6 State a fact necessary to make the information contained  
7 therein not materially misleading. Has the standard out for  
8 things of this nature.

9           About as nonbinding as completely binding -- excuse me.  
10 It is completely nonbinding deal because they had a total out,  
11 a total contingency to get out on the very type of facts the  
12 plaintiffs complain about.

13           There is no question that Mylan would have reduced or  
14 withdrawn its offer. Of course, we have a view on that from  
15 supposed expert, a guy named Dr. Nye, N-Y-E. You will hear  
16 about his lack of viability as an expert from Mr. Groner, but  
17 he is helpful to us in this one respect, your Honor.

18           He testified in his deposition that he didn't see how  
19 anyone in their right mind could think that Mylan, upon knowing  
20 that Perrigo had been lying about the prospects associated with  
21 its generic Rx division and its integration performance Omega  
22 would have completed the deal. Their own expert says the deal  
23 would have never gone forward.

24           And in a thing that I've not witnessed -- and Mr.  
25 Hardiman and I talked about this in the collective; we're

1 old -- but our collective seven years of experience, we haven't  
2 witnessed quite the effort that we saw by the plaintiff to  
3 change that testimony through an errata sheet.

4         They recognize the statement kills their 14(e) claims,  
5 that's why they are dead on arrival, amongst other reasons, and  
6 they try to make it less damaging by changing Mr. Nye's words,  
7 by flat changing testimony. And I will put up his fatal  
8 concession as a slide. I will put up plaintiff's effort to  
9 come back from the grave.

10         Plaintiffs changed Dr. Nye's testimony from saying, he  
11 does not see how anyone in their right mind could think that  
12 Mylan would have completed the deal, to him saying that, he  
13 doesn't see how anyone in their right mind could know whether  
14 Mylan would have completed the deal.

15         Now, even the errata sheet is the death, now, for the  
16 14(e) claim, because it is wholly speculative as to whether  
17 they would have completed it or not through their own expert's  
18 testimony. Wholly speculative is the bar they have to get over  
19 to sustain a loss causation a burden of proof, which is on  
20 them. And so even their own expert told the truth the first  
21 time, frankly. Even when you contort his testimony, it doesn't  
22 save the day; the 14(e) claim has gone to go.

23         Now, there are other loss causation issues outside the  
24 14(e) context, your Honor. Those having to do with the 10b-5  
25 portion of the complaint. And they fail to meet their burden

1 to show why there is a loss causation with respect to 10b-5  
2 claims as they have with respect to the 14(e) claim.

3       They acknowledge that a corrective disclosure must  
4 relate to the same subject as the misrepresentation at issue.  
5 Here, however, even just plain reading, allows the Court to  
6 understand that the alleged corrective disclosures claim they  
7 do not relate to the same subject matter of the complained  
8 about and challenged statements. We explain in great detail in  
9 our papers why they cannot prove loss causation, with respect  
10 to their 10b-5 claims, but I will focus on one glaring example.

11       On April 22, 2016, there were reports that Mr. Papa was  
12 resigning as Perrigo's CEO. Plaintiffs claims -- and I think  
13 rather bizarrely -- that Mr. Papa's resignation revealed the  
14 defendants previous statements about Perrigo's integration of  
15 Omega were false and misleading. There is no records in these  
16 statements to Omega.

17       There is no suggestion that Mr. Papa who gets an  
18 unbelievably valuable deal to go run Valeant, a big drug  
19 company in trouble, was leaving to take that unbelievable job  
20 because of problems at Omega. It's a massive jump and it's  
21 indicative of the type of speculation that is replete in their  
22 pleadings and in their complaint.

23       There is nothing new about Omega disclosed on April 22  
24 2016, and their very consistent failure to connect so-called  
25 corrective disclosures to the same subjects as the alleged



1 misrepresentations doom them under the loss causation element  
2 they must plead under 10b-5.

3         Now, Dr. Nye also fails to account for negative  
4 developments in other aspects of plaintiff's business --  
5 Perrigo's business, excuse me -- on the same dates of these  
6 challenged statements, including other aspects of Omega and  
7 segments unrelated to generic drugs, or Omega. These are  
8 things that also contribute to the share price decline. This  
9 is known as his failure to disaggregate.

10         So to summarize quickly, if Perrigo were to put out a  
11 statement that said X, Y, or Z about its generic drug business  
12 and the stock went down and on the same day it said  
13 disappointing results in the over-the-counter market,  
14 disappointing results in some other segment, disappointing  
15 results in Rx, the share price decline has to be studied and  
16 examined and segregated.

17         You can't say that when there is three or four reasons  
18 for a price decline on a given day, all of that damage  
19 associates and relates to one of your complaints. And that's  
20 basically what Dr. Nye does. He's got the disaggregation  
21 phobia in spades. He basically says, Any time the stock goes  
22 down, has any disclosure at all that touches on stuff in this  
23 case, that the 100 percent of that stock price decline is  
24 attributable to that. It is just illogical.

25         And Mr. Groner will go to that as why that is part and

1 parcel of why he should be excluded. Dr. Nye tries to take  
2 statements about underperformance Omega as corrective of the  
3 allegedly misleading statements about integration. But as  
4 we've gone through, your Honor, underperformance is not in this  
5 case. It was only in the case for a little bit with respect to  
6 four geographic markets, and those claims were dismissed by  
7 Judge Arleo.

8       There has been no amendment to bring performance to this  
9 case. Plaintiffs try, in their papers, to convolute and  
10 collate integration and performance because they know they have  
11 not carried the day with respect to integration claims, but we  
12 take the Court through our papers how unavailing that effort  
13 is.

14       So for these reasons and others we disclosed in our  
15 briefs, plaintiff's failure to prove loss causation is another  
16 reason summary judgment should be granted for the defendants.

17       I now turn the podium over to counsel to the individual  
18 defendants.

19       Thank you very much, your Honor.

20       THE COURT: Thank you.

21       MR. HARDIMAN: I will have some slides, would you like  
22 a copy of them up at the bench to follow along?

23       THE COURT: Yes, please.

24       MR. HARDIMAN: My name is John Hardiman.

25       I will try not to go over old ground and cover the two

1 surviving theories that exist against Ms. Brown.

2           The first are eight alleged misstatements regarding  
3 generic Rx pricing.

4           And the other is one, just one, alleged misstatement  
5 regarding the present success of Perrigo's integration of  
6 Omega.

7           A couple of preliminary matters, your Honor, there is no  
8 dispute that Ms. Brown can only be held liable for statements  
9 she made. Not statements of anybody else, not statements of  
10 the company.

11           There is also no dispute that in assessing scienter, the  
12 only documents that are relevant are those that she saw. The  
13 plaintiff's brief confuses that, mix and matches a lot of  
14 documents, but I think our brief does a pretty good job of  
15 clearing that up. I urge you to take a look at that.

16           Starting with the generic Rx pricing, of course, the  
17 critical elements that the plaintiffs have the burden of  
18 proving are falsity and scienter. And they just haven't done  
19 it at all with respect to Ms. Brown.

20           Going to slide 5, as I think Mr. Wareham has ably  
21 pointed out, when it comes to price fixing there is simply no  
22 there there, in this case. And if there is something below  
23 there -- there being no there there, -- that's what it is with  
24 respect to Ms. Brown.

25           If we go to slide 7, since Mr. Wareham already covered

1 why there is no price fixing in the case, there is simply no  
2 evidence that the Ms. Brown had any knowledge whatsoever of any  
3 price fixing going on anywhere. Even if it existed, there is  
4 no evidence that Ms. Brown knew anything about it. There is  
5 nothing direct. There is nothing circumstantial. Direct,  
6 there is no person in this case who was deposed who said  
7 anything like Judy Brown knew about price fixing. There is no  
8 document in this case which says anything, like, Judy Brown  
9 knew about price fixing.

10 To drive the point home more -- as Mr. Wareham said and  
11 I agree with him -- this entire claim was intended to piggyback  
12 on actions of the government. The Attorney General's  
13 litigation and the Department of Justice. Plaintiffs admit  
14 that in the entire complaint by the State Attorney General, Ms.  
15 Brown is not even mentioned.

16 In the affidavits that had been submitted by plaintiffs  
17 from former employees of Sandoz, Ms. Brown is not mentioned.  
18 In the Sandoz-deferred prosecution agreement which they point  
19 to, Ms. Brown is nowhere mentioned. Of course, the Department  
20 of Justice brought no claims against Ms. Brown, but even more  
21 importantly, while they blocked the depositions of many people  
22 in this case because they thought they might have information  
23 regarding their investigation, they permitted the deposition of  
24 Ms. Brown to go through.

25 They indicate not only did they have no claim to bring

1 against her, they didn't think she knew anything about price  
2 fixing. She simply didn't factor in the matter at all.

3 Now, faced with this overwhelming effort, plaintiffs try  
4 in their papers to come up with some circumstantial case  
5 against Ms. Brown.

6 Their expert, Mr. Clark, who Mr. Groner will talk about,  
7 opined that price fixing could have happened at 19 industry  
8 conferences. Of course, just because there is an industry  
9 conference doesn't mean there is any price fixing, but  
10 Mr. Clark opines maybe that's where things happened.

11 Ms. Brown only went to two of these conferences. And  
12 she was deposed for two days and they never asked her what  
13 happened at the conference. They never asked anybody else what  
14 was Ms. Brown doing at the industry conferences. Well, if they  
15 were trying to imply that Ms. Brown somehow did something  
16 untoward at these conferences, they've got to try and make  
17 their case. By not asking her a question about it or anybody  
18 else, that's not behavior trying to make a case. That's  
19 behavior trying to avoid summary judgment and it shouldn't  
20 work.

21 The other thing they point to is whether or not  
22 Ms. Brown knew anything about pricing decisions at all.  
23 Undisputed, Perrigo had a pricing committee. Ms. Brown wasn't  
24 on it. Undisputed, John Wesolowski who was the senior vice  
25 president of the commercial operations was the ultimate

1 decision-making authority.

2 Now, in trying to get some iota of a case, plaintiffs  
3 focus on some testimony from Mr. Wesolowski and also his boss,  
4 Doug Boothe, which they claim suggests that pricing decisions  
5 were past by Ms. Brown for sign-off.

6 Now, even if that were true, it's by no means any  
7 evidence that she knew anything about price fixing. Just the  
8 fact that you know something about prices doesn't mean you know  
9 anything about price fixing. But of course, the testimony  
10 doesn't say that. What Mr. Wesolowski said was that he  
11 believed that his boss, Mr. Boothe, in situations where a  
12 pricing increase might create a penalty, which sometimes  
13 happens -- sometimes you have a deal with a customer and you  
14 decide to raise the prices and that triggers some sort of  
15 penalty payment to the customer.

16 He said, in those situations, Doug Boothe might give a  
17 heads-up to the financial department that there will be an  
18 impact on revenue by the price increase.

19 What Boothe said was that he might speak to somebody in  
20 Ms. Brown's organization -- she was the CFO -- just to give  
21 them that sort of heads-up because of the impact on revenue.  
22 There is nothing that can be drawn from that, that Ms. Brown  
23 was somehow involved in knowing about price fixing.

24 Now, if you take a look at the statements they focus on,  
25 they are totally vanilla statements to the effect of, you know,

1 we face price competition in the market. If you look at the  
2 underlying documents that she saw before making those  
3 statements, they are totally consistent with what she said.  
4 This is the rare 10b-5 case where the underlying documents and  
5 the statements made publicly are totally consistent.

6           What plaintiffs seem to be trying to argue is that,  
7 well, because there was a price-fixing conspiracy, which of  
8 course they haven't proven, and because Ms. Brown spoke about  
9 pricing and knew about the price-fixing conspiracy, which of  
10 course they haven't proven, the mere fact that she spoke about  
11 pricing had to be misleading because she didn't mention the  
12 price-fixing conspiracy.

13           That sort of convoluted argument has been tried before  
14 and rejected. I refer you to the *Utesch* case which we cite in  
15 our briefs which the court said just because somebody is talk  
16 about pricing obviously doesn't mean they know that somebody  
17 acting in criminal behavior. That is quite a leap to make, but  
18 that's the leap that you are being asked to make, your Honor,  
19 in order to keep Ms. Brown in this case on the price-fixing  
20 claim.

21           One other thing, I won't spend a lot of time on it, but  
22 I just want to mention it. In the plaintiff's response brief  
23 to our motion for summary judgment appeared for the first time  
24 in this case a reference to a statement Ms. Brown made on  
25 October 22, 2015. The statement which is in slide 15 is nearly

1 all of our revenues are insulated from the current pricing  
2 drama you see playing out in the pharmaceutical industry today.

3 Now, it is beyond me what exactly case they are making  
4 based on that statement. And of course, I can't look at the  
5 complaint for any explanation because they don't plead anything  
6 about this statement in their complaint. They don't plead she  
7 said anything on October 22nd at all that's important. For  
8 that reason alone, any discussion of this statement should be  
9 rejected.

10 But what she was talking about, what their own expert  
11 said she was talking about was you might remember a few years  
12 ago Martin Shkreli was all over the news because he had raised  
13 the price of, I think it was, an aids drug by some astronomical  
14 number. That was the pricing drama going on that she is  
15 referring to. It's got nothing to do with price fixing at  
16 Perrigo. Oh, my god, if the pricing drama was price fixing at  
17 Perrigo, it would be public, we wouldn't be here in a 10b-5  
18 fraud case.

19 The plaintiffs do cite you to the fact that in other  
20 cases followed by some of the opt-out plaintiffs, this  
21 statement has been referenced unlike their complaint which  
22 doesn't reference it at all. But in those cases, the opt-out  
23 plaintiffs contend that this statement was suggesting something  
24 completely the opposite of what's being suggested here that  
25 there was, in fact, price competition that Perrigo was facing,



1 not that it indicated that there was lack of competition, which  
2 is the case with a price-fixing conspiracy.

3 In sum, your Honor, as I think you probably picked up  
4 from my presentation here, I don't think Ms. Brown can be  
5 dismissed from this price-fixing part of this case fast enough.  
6 It is offensive that she is in it. There are simply nothing  
7 that these people have developed in four years to tie her to a  
8 price-fixing conspiracy.

9 The other allegation against her isn't much better,  
10 and it has to do with one statement she made with regarding  
11 integration. I mean, I will give them this, she, unlike  
12 knowing about price fixing, she did know there was integration,  
13 but that's about the only thing that distinguishes the merits  
14 of this claim versus the merits of the price-fixing claim.

15 If -- let's go to slide 21.

16 Now, slide 21 is the statement, and this is the only  
17 statement that she made with respect to integration that is an  
18 issue in this case. This is the entirety of what their  
19 securities fraud claim against Ms. Brown is based on. And it's  
20 the statement, We close the transaction on March 30th. So  
21 we're about nine weeks in right now, and we are online, I would  
22 say we are in line with our going online integration process.  
23 Back office is working smoothly. We are bringing them on to  
24 all of our back office systems.

25 That's it.

1           Saying, essentially, nine weeks into the transaction, I  
2 think we're online with integration.

3           I would echo what Mr. Wareham said that I think there is  
4 a very strong argument that's not the kind of statement you can  
5 premise a securities fraud claim on at all. Not only is there  
6 the case that Mr. Wareham cited saying integration is far too  
7 loose a term on which the basis to base of security fraud is  
8 claimed, but I also refer you to the *Nokia* case from March 29,  
9 2021, where the Southern District of New York said statements  
10 touting the progress of the integration are nonactionable  
11 puffery.

12           A couple of timing issues which I think are important  
13 when considering this comment. The merger occurred on March  
14 30th. That's when Perrigo bought Omega, March 30th. The  
15 integration, quite obviously, cannot begin until March 30th,  
16 because that's when the companies are put together.

17           Nevertheless, plaintiffs cite over and over again  
18 documents that were developed in the preclosing stage when the  
19 parties were getting together trying to figure out what had to  
20 be integrated as a sign that there was some problem with  
21 integration. How could there be a problem with integration  
22 before you start to integrate? Five of the ten documents that  
23 cite are from this preintegration period.

24           And if you take a look at the documents, it will be  
25 pretty evident, you know, how, frankly, silly this is.

1 I mean, plaintiffs cite a March 2015 email in which my  
2 client, Ms. Brown, states that Omega's extraordinary accounting  
3 charges were an immediate flag for a discussion and probably a  
4 painful part of finalizing goals for this year. That's what  
5 she says a month before the integration begins. What she's  
6 saying is, we need to address extraordinary accounting charges.

7 Now, why did that have to be addressed. Well, that was  
8 explained by Ms. Brown and Mr. Winowiecki and other witnesses  
9 in the case. Omega was a European company and operated under a  
10 different accounting system, IRFS. Once they became a Perrigo  
11 subsidiary, they had to operate under GAAP. And one difference  
12 between IRFS and GAAP is the way extraordinary charges are  
13 treated.

14 Another thing they cite, a February 2015 email six weeks  
15 before the merger closes, in which somebody who works for  
16 Ms. Brown says, Oh, maybe it does not have a forecasting  
17 process. Ms. Brown said, Well, that's not unusual for European  
18 companies. They usually don't do quarterly forecasts.

19 And so what they talk about in this document and other  
20 documents is when we're merged, we are going to have to bring  
21 them into our forecasting process. Neither of those things  
22 shows there is a problem with integration, those are just the  
23 things you got to deal with to do the integration. For you to  
24 determine whether you're online with the integration, there  
25 needs to be a line. And that's what they were doing before the

1 merger occurred.

2 Another timing issue, and Mr. Wareham touched on this,  
3 obviously, since this case has everything with to do with what  
4 Ms. Brown knew when she made this statement on June 23, 2015,  
5 things that occurred after June -- when she made that statement  
6 on June 23, 2015, are irrelevant. Plaintiffs are in love with  
7 a retrospective that Perrigo did in May of 2016, 10 months  
8 later. This says things that we could have done things better  
9 in integration. Hey, great. Companies go back and look at  
10 things all the time. That's got nothing to do with what  
11 Ms. Brown knew on the day she spoke on June 23rd.

12 As the *OFI Risk Arbitrages* case said, Relying on a later  
13 filed document or statement is an attempt to prove fraud by  
14 hindsight which Third Circuit has long rejected.

15 Now, let's talk about what she actually knew during the  
16 period from March 30th when the companies closed their  
17 transaction to June 23rd, nine weeks later when she made the  
18 statement at issue, the only statement at issue, on  
19 integration.

20 Well, here is the May 8, 2015 document, slide 30.  
21 And look at what the May 8th document is talking about at the  
22 top. The two topics we just went over a few minutes ago with  
23 the two issues that they raised that occurred preintegration.

24 IRFS as gap conversion project progressing. Good news,  
25 on the issue that was identified preclosing. Continue to have

1 dialogue with Omega on monthly and quarterly reporting. Again,  
2 attacking the issue that was identified preintegration,  
3 preclosure, pardon me, that needed to be addressed during  
4 integration.

5           So on May 8th she gets good news. May 12th, five weeks  
6 before her statement, she gets an email that says, I just  
7 finished a very positive call with Barbara regarding the  
8 finance integration work streams with Omega. Barbara is  
9 Omega's CFO. So she gets an email on May 12th saying, I just  
10 talk to Barbara, CFO at Omega, very positive.

11           June 8th, now less than -- a little more than two weeks  
12 before her statement on June 23rd. An email to Judy Brown from  
13 somebody at Perrigo again, Very positive approach on progress  
14 on integration. There is only one mildly negative statement  
15 that in the IETSEAP space, Perrigo was looking to take more  
16 control than originally agreed. But that's not a statement  
17 that the integration is not happening. That's a statement that  
18 they are overintegrating, if anything. Perrigo is taking  
19 control of the company they bought. All good news if you are a  
20 person wondering how is the integration going.

21           June 22nd, the day before her statement, gets an email  
22 that the employees at Omega, the rank and file, they are  
23 excited to feel like things are changing outside of the  
24 increased reporting requirements, smile, meaning because they  
25 have to talk to more people now, and that they are part of a

1 larger organization.

2 Also on June 22nd, the day before she speaks, she gets a  
3 document from her second in command, Ron Winowiecki, entitled,  
4 Success to date, about integration. Financial reporting,  
5 that's our old issue about IRFS and GAAP. FP&A, treasury, risk  
6 management, SOX. Who after looking at all of this wouldn't  
7 feel they could at least say, things are online. The record  
8 totally supports Ms. Brown's statement.

9 What do plaintiffs point to? They point to two things.  
10 The first is that there was a meeting on June 27th in which  
11 Mr. Coucke, who is the former head of Omega -- and I should  
12 point out, Omega is -- he basically controlled Omega. I think  
13 there was some public shareholders. It was basically a private  
14 company he controlled. And what he was -- sold his company to  
15 a public company in the United States. It's a different thing.  
16 He wasn't going to be in charge anymore.

17 And he had an outburst at a meeting that it was attended  
18 by Ms. Brown. And according to testimony from Tom Farrington  
19 who was one of the people who was there, he erupted around  
20 nothing is working right with integration in an outburst  
21 followed by comments by Ms. Brown.

22 So that sound bite appears in their brief over and over  
23 and over again.

24 But the good news is that we have context because on the  
25 same day Mr. Coucke wrote an email explaining exactly what he

1 was upset about.

2 And the email says things like, Since close, never a  
3 normal day, what we agreed on before signing with respect to  
4 functioning culture of Omega is not honored. Perrigo corporate  
5 wants to change us, not to make us better because you are the  
6 boss. It's always the Perrigo way. Look at the list where  
7 Perrigo already tried to change Omega.

8 You don't see in this memo things like, you know, The  
9 IRFS and GAAP isn't going right, or, Back office isn't working,  
10 or, A little worried about the forecasting. What you see is  
11 somebody complaining that, well, what he sold into was  
12 happening. Perrigo is taking over. He is not complaining that  
13 integration isn't happening. He is complaining he is being  
14 integrated out of relevance. Not an unusual tantrum for  
15 somebody who is used to being in control and not anymore, but a  
16 tantrum nonetheless, and nothing that undercuts the enormous  
17 positive information she had gotten on the nuts and bolts of  
18 integration, which was the basis for what she said on June  
19 23rd.

20 The only other document that they really focus on is a  
21 document from June 22nd -- and this is slide 37 -- in which I  
22 think is Mr. Winowiecki says that, cash flow is off 70 million  
23 Euros in Quarter 2. And that Quarter 2 would have been --  
24 Quarter 2 would have been the first quarter when Omega was  
25 within Perrigo. He does not say there, nor has anybody else

1 anywhere, that it had anything to do with integration.

2 In fact, in the very document where he says this, there  
3 is a separate section on integration. So this is a different  
4 issue entirely having nothing to do with integration. And I  
5 know Mr. Wareham talked about the fact whether this is a case  
6 about performance or integration, with respect to Ms. Brown and  
7 her statement, it's kind of beside the point, because the only  
8 thing that they are focusing on from Ms. Brown, again, is one  
9 statement that she made regarding integration, whether there's  
10 online, whether it was online.

11 With that, your Honor, just to sum up, the price fixing,  
12 I mean, there is just nothing to connect Ms. Brown there. The  
13 integration really the same story, she was involved in  
14 integration. She wasn't involved in pricing at all, but the  
15 overwhelming record is that she received positive news and of  
16 course, proving scienter is the plaintiff's burden. So in this  
17 situation, a tie goes to the defendant.

18 Thank you, your Honor.

19 I don't know if you have any other questions.

20 THE COURT: Thank you, Counsel.

21 MR. BRODSKY: Would you like a break, your Honor?

22 THE COURT: I'll leave it up to the parties when you  
23 want to think it would be a good time for a break. I don't  
24 need a break.

25 MR. SILVERMAN: You're up there.



1 MR. BRODSKY: Thank you so much. We have a PowerPoint  
2 as well.

3 Thank you so much. Court Reporter, my name is Reed  
4 Brodsky from Gibson Dunn on behalf of Joseph Papa.

5 Your Honor, as we get this, hopefully, get the  
6 PowerPoint connected, I did want to take a step back and give  
7 you guide posts as to what I was hoping to accomplish in a  
8 short period of time, now that you have heard a lot regarding  
9 the lack of merit in many of the plaintiff's claims.

10 We put in strong briefs, I think, that covered the law  
11 and cover a lot of the issues. What sometimes doesn't come  
12 across on the page are the documents themselves. And that's a  
13 challenge that you have in a case here where the documents are  
14 the best friends of Mr. Papa, Ms. Brown, and Perrigo. This is  
15 a case where we want you to look at the documents, and I'm  
16 going to go through some and put them on the screen.

17 Because when the plaintiffs describe the documents,  
18 almost every time they're shifting the meaning or they're  
19 playing with the language and they are trying to suggest to you  
20 that it is a trial court issue. It is an issue of fact for a  
21 jury. When in reality, based on the standard, they don't meet  
22 the standard. None of their claims are backed up by anything  
23 more than a scintilla of speculation. It does not meet the  
24 standard and thus, summary judgment is appropriate.

25 So what I hope to do is in 30 seconds or, so give you a

1 short background about Mr. Papa. And then talk a little bit  
2 about the lack of motive evidence. When we started this case,  
3 they had theories of motive and now they have gone by the  
4 wayside and their theories of motive have completely been  
5 eviscerated. They are actually theories of innocence.

6 And finally, address the two issues that are the  
7 remaining narrow theories they allege against Mr. Papa that he  
8 made allegedly materially false statements, with respect to  
9 price fixing and materially false statements with respect to  
10 Omega integration.

11 So if you can put up the first slide. Mr. Papa is  
12 somebody who has an unblemished record. This is literally his  
13 first case which he has ever been accused, by anybody, of  
14 securities fraud and making false statements, and it is very  
15 disheartening to him personally.

16 And he began as a pharmacist. He worked his way up in  
17 the industry for 35-plus years in the pharmaceutical,  
18 healthcare, and specialty industry. An industry where people  
19 are dedicated to the improvement of people's lives. The notion  
20 that somebody would suggest to him that he made a false  
21 statement intentionally in a misleading way is just  
22 preposterous, but let's address that.

23 He was the CEO and chairman of the board Perrigo from  
24 October 2006 to April 2016. He had a number of units reporting  
25 to him. Perrigo marketed over 10,900 products. They had a

1 massive number of products in their portfolio. There were over  
2 13,000 individuals worldwide and they operated in over 30  
3 countries. You are going to see -- because we will show it to  
4 you -- the documents they point to, or the email they point to  
5 that they pull out to suggest that somehow he knew about  
6 something. Then you are going to see what he actually said.

7         And I hope, your Honor, you'll see that it's meritless  
8 what they're saying. It is not perjury. He is now presently  
9 the CEO and chairman of the board of Bausch Health, which was  
10 May 2016 to the present. So again, the two narrow theories on  
11 slide 3, this is what they're left with after the motion to  
12 dismiss was partially granted. Mr. Papa's statements  
13 concerning competitiveness and pricing in the generic drug  
14 market. And statements regarding the present success of the  
15 integration of Omega.

16         Now, just as a general point, his statements were  
17 factually accurate. It's provably accurate. We don't have the  
18 burden to prove they are accurate, but I think I will show you  
19 today they were actually factually accurate. And so their  
20 claim that they were somehow misleading or materially false is  
21 contrary to the record evidence.

22         And Mr. Papa did not act with scienter with respect to  
23 the challenged statements.

24         I will quickly move over slide 5 which I think your  
25 Honor knows very well that mere allegations, bare assertions,

1 suspicions are not sufficient to defeat a motion for summary  
2 judgment. They need to present something that is more than  
3 merely colorable. Something that's significantly probative.  
4 And that, they can't come close to.

5         Again, on the next slide we just want to highlight is,  
6 they have to prove and show and demonstrate significant  
7 evidence that shows his knowledge, his intent, and if they want  
8 to show a form of recklessness, it is a very strong form of  
9 recklessness in the Third Circuit. It is an extreme departure  
10 from the standards of ordinary care.

11         Now, in the Third Circuit they don't have to prove  
12 motive, but evidence of motive might be helpful.

13         And when they started this case, they said -- Mr. Papa  
14 was motivated in two respects to lie to the public, which is  
15 absolutely wrong. The first they said that he had a desire to  
16 fend off the Mylan hostile tender offer and that was evidence  
17 of motive.

18         Now the Court has already rejected this at page 18 of  
19 Roofer's Pension 2018 Westlaw 3601229. The Court said such  
20 allegations, quote, Fall woefully short of demonstrating  
21 scienter, end quote, because they do not suggest any, quote,  
22 concrete and personal benefit.

23         There is nothing in the record since that time that has  
24 helped them in that respect. In fact, what the record shows  
25 is, had Mr. Papa supported the Mylan tender offer, he would be

1 far more wealthy today. It was against his own financial  
2 interest in what he believed to be the right thing to do, given  
3 his stock position in Perrigo.

4 And then second, the plaintiffs have alleged this other  
5 motive -- where they insist on it, and I think they still  
6 insist on it today, although we will have to see what they say  
7 today -- that he had some unusual stock sales that somehow were  
8 evidence of motive. I want to give you a brief overview and go  
9 into those.

10 He did not engage in unusual stock sales. Quite to the  
11 contrary. During the relevant period his overall holdings  
12 increased -- increased, not decreased -- increased by 9.8  
13 percent during the class period. I call that motive contrary  
14 to what they think. Had he been selling the stock during the  
15 period of making allegedly false statements, that resonates  
16 with some proof of motive, but here we're talking about  
17 somebody who increased their ownership of stock during the  
18 alleged period that he is -- that they allege that he is making  
19 false statements.

20 In addition, if you compare his trading during the class  
21 period to before, he took steps to stop his trading during the  
22 class period. And I want to go through, briefly, that timeline  
23 because I think it is very, very compelling.

24 On slide 8 we have in March 2015 Mr. Papa entered into a  
25 Rule 10b5-1 trading plan. I am sure your Honor knows this, at

1 the time an executive of a public company has no access to  
2 material nonpublic information pursuant to an FCC rule, they  
3 may initiate a plan in which they have no control over once the  
4 plan is initiated.

5 And they can't change the plan if they want to buy and  
6 sell, that plan has to be initiated. They can't change the  
7 plan when they have material nonpublic information.

8 So he initiated a plan at a time he didn't have material  
9 nonpublic information in March of 2015, that would only trigger  
10 sells of Perrigo stock when it reached the price of \$150 per  
11 share.

12 In April of 2015, Mylan made an unsolicited offer and  
13 what did he do? Now, he could have let that plan run. The  
14 stock was moving up fast. He could have benefited from letting  
15 his trading plan go. Why? At the time that he initiated the  
16 trading plan, he had no idea that Mylan would come in with this  
17 tender offer. But what did he do? I think this is very  
18 telling.

19 He canceled it because, quote -- and he testified about  
20 this and no one has challenged him about it, because you can't  
21 challenge the stubborn fact that he canceled. He said he,  
22 quote, Didn't feel that the CEO trading during that time period  
23 would be appropriate. That tells you everything you need to  
24 know about the character of Mr. Papa.

25 If we move onto the next slide, August 25, 2015, he sold

1 vesting shares for tax liabilities. Now, that as under the  
2 case law is heavily against an inference of scienter, there are  
3 cases that we cite in our brief for that. It was 11,000 and  
4 his holdings increased by 11,490 shares as a result.

5 November 13, 2015, Perrigo shareholders defeat the Mylan  
6 hostile tender offer and that's when he enters into a new plan.  
7 December 28th, Mr. Papa sells shares pursuant to the 10b5-1  
8 plan, the only date of sale by Mr. Papa during the class  
9 period, the first sale of share in 21 months and the total  
10 shares sold on this date were one-tenth of the total number of  
11 shares in the 25 months before the class period.

12 Finally, leading into the fourth quarter, before the  
13 fourth quarter results are announced, he cancels his trading  
14 plan because, quote, He felt that the right thing to do was not  
15 to make any additional 10b5-1 trades until all the information  
16 became publicly available. This is significant in terms of  
17 determining scienter.

18 We respectfully submit that this is now probative  
19 evidence and an insight into his mind as he is making the  
20 statements during the class period. These are stubborn facts  
21 that I think the plaintiffs have a hard time grappling with.  
22 Let's go to what they are actually trying to claim. First,  
23 with respect to generic Rx competition and allegations of price  
24 fixing.

25 Going to slide 13, you've already heard the evidence.

1 There is an absence of any evidence of price-fixing scheme.  
2 Let's assume in a hypothetical fantasy world, there was some  
3 evidence of a price-fixing scene. Hearsay upon hearsay,  
4 speculation, whatever it may be. Assuming that was accurate,  
5 none of the direct evidence involves -- alleged direct  
6 evidence, hearsay upon hearsay -- involves Mr. Papa. The  
7 plaintiffs had claimed that Mr. Papa was, quote, Involved in  
8 the pricing decisions. These are their claims. That's been  
9 proven untrue.

10 None of the several episodes in which they rely on for  
11 alleged price fixing that their expert has put forth involve  
12 Mr. Papa. And the documents they rely on for circumstantial  
13 evidence, they don't come close to supporting any reasonable  
14 inference that Mr. Papa knew about price fixing.

15 So stepping back, I won't reiterate and belabor the  
16 point, but there has been no allegation by any federal or state  
17 law enforcement authority, in the country, in the world,  
18 alleging wrongdoing against Mr. Papa.

19 And they have admitted that.

20 And then the affidavits on slides 15 that they rely on  
21 which was already addressed, they concede that the two  
22 affidavits offer no evidence with respect to Mr. Papa.

23 So what do they rely on? Let's look at the actual  
24 documents, because we embrace these. These are evidence of  
25 innocence.



1           In their brief they cite these documents. So let's put  
2 them up. Slide 16, they rely on plaintiff's Exhibit 271. But  
3 there is no proof of Mr. Papa's awareness of price fixing and  
4 the proof of how much they stretch the meaning of words and  
5 they ask your Honor to overlook them is this document.

6           In this document Exhibit 271, your Honor, they point to  
7 the words, this is a board -- he is not on the email, but he  
8 did receive these board slides. And one of the slides that  
9 they point to -- this is the slide -- slide 16 of Exhibit 271  
10 says, Pricing environment more difficult. And it says, Drug  
11 pricing now in the news. They point to those statements and  
12 they say, That's evidence he knew about price fixing. I'm  
13 sorry. Where?

14           Like if I got that document, I would be struggling how  
15 in the world am I supposed to know from pricing environment  
16 more difficult, or drug pricing now in the news, that somehow  
17 people in Perrigo might be fixing prices, or somebody in the  
18 their world they might be fixing prices. They have to come up  
19 with evidence that's significantly probative that Mr. Papa knew  
20 or recklessly disregarded there was price fixing. That  
21 document does not prove that.

22           Let's go to the next document because I think it's very  
23 telling -- your Honor, we're talking about millions of pages of  
24 documents, as I understand it, they reviewed and produced.  
25 We're talking about depositions upon depositions upon

1 depositions. They have combed the earth for evidence against  
2 Mr. Papa knowing about price fixing and this is the exhibit  
3 they rely on in their brief.

4 Exhibit 272. And what is Exhibit 272? It is a single  
5 customer of the millions of customers of Perrigo who writes a  
6 letter to Mr. Papa. This is in November 12, 2014. And that  
7 gets sent -- his secretary, Genni Plyley at the time, sends it  
8 to Mr. Papa who has a practice -- as he testified -- of giving  
9 any of the letters to the various departments to handle. What  
10 does this person said? This person says that they were using a  
11 desonide cream, a form of cortisone that is more powerful.  
12 Desonide cream and the cost from 2013 to 2014 for 60 grams went  
13 up from \$42 to \$241, a six-fold increase.

14 Now, I'm sorry. That cannot be, as a matter of law,  
15 evidence of someone being aware of price fixing. It just can't  
16 be. A jury should not look at that and decide whether or not  
17 that's price fixing. This is for a Court to decide. This is a  
18 thousand steps too far from alleging that someone knew about  
19 price fixing.

20 If this is about someone who knows about price fixing,  
21 somebody could write a letter to this Court and suggest I saw a  
22 suspicious character outside of this Court, come into the  
23 Court, several times a week, and is that supposed to be  
24 evidence of some kind of criminal conspiracy? If the Court  
25 looks at the letter and says, I'll pass it on to the marshals?

1 This is not evidence of knowledge of any kind of price fixing.

2       Next slide 18, Mr. Papa was not involved in pricing  
3 decisions. I believe this is undisputed. The pricing  
4 decisions were made for the generic unit, was made by a senior  
5 vice president advised by a pricing committee. The testimony  
6 confirms that Mr. Papa wasn't a member of that pricing  
7 committee. And the pricing committee did not regularly share  
8 its specific pricing decisions with the executive committee.  
9 And what is some of the best proof of this?

10       I mean if we take a look at slide 19, this is the  
11 corporate representative himself of Perrigo who said that, the  
12 level of detail regarding pricing decisions was, quote, simply  
13 not appropriate for somebody at the executive level.

14       I mean, I think that says it all. There is zero  
15 evidence that Mr. Papa was involved in pricing decisions. And  
16 I haven't seen it. I haven't heard it. And I'm troubled that  
17 they are not voluntarily dismissing this, with respect to  
18 Mr. Papa.

19       Now, he did receive monthly and quarterly reports from  
20 business units. But none of those reports have any evidence of  
21 a price-fixing scheme. He did attend four conferences of the  
22 19 conferences that their expert said was an opportunity to  
23 collude. That's what the expert said. 19 industry  
24 conferences. You go to a conference. It is an opportunity to  
25 collude.

1           Personally, I don't think that's evidence of anything  
2 because people go to conferences all the time. People go to  
3 judicial conferences. People go to lawyer conferences. People  
4 go to conferences for all sorts of reasons.

5           That can't be evidence of wrongdoing because you go to a  
6 conference. Put that aside, even assuming it is some kind of  
7 evidence -- which it's not -- he went to four conferences of  
8 the 19 and they were in 2013 and 2014, prior to the class  
9 period.

10           Now, Plaintiffs asked Mr. Papa zero questions about  
11 these conferences. I barely think they asked him any questions  
12 about price fixing at all. Your Honor, they asked for two days  
13 of Mr. Papa's testimony. That's the class plaintiffs and the  
14 opt-out plaintiffs. Two days.

15           We had no objection. If they asked for three days, we  
16 would have given them three days, no objection. You want any  
17 question to Mr. Papa, go ahead, here is your opportunity. He  
18 was one of the last deponents to be deposed. You built up your  
19 entire record. You loaned your documents.

20           And how long did they ask him questions? 14 hours they  
21 asked for. We gave them all 14. Five. They took five hours  
22 out of 14. I had to ask them the question at the end of the  
23 five hours, I was so shocked sitting there that they didn't ask  
24 any questions about the relevant issues here. They didn't want  
25 to know from the one person who can tell them what a document

1 meant or what he believed? It was shocking.

2 And I think because they didn't want to know his  
3 answers. They want to rely on these little bits and pieces  
4 from documents without actually getting to the truth. I had to  
5 ask him the single question, were you aware of -- were you  
6 involved in pricing? Which of course, he said no.

7 Now, I think this pretty much finishes the price-fixing  
8 issue. And it's just really troubling that they continue to  
9 pursue it. Mr. Papa did make statements about the  
10 competitiveness of the market. So let's put that up on slide  
11 20.

12 He said, obviously, it's a competitive market out there.  
13 Now, I think that's true. I mean, there are, as I understand  
14 it, over 90 companies competing with Perrigo at this time. I  
15 would call that competitive. I don't think these statements  
16 that it's obviously a competitive market out there, or at the  
17 bottom, I'm not going to make any specific comments on a  
18 customer or product. How in the world can that be evidence  
19 that Mr. Papa is aware of price fixing? It is obviously not.

20 And at the same time, if we go to slide 21, Plaintiffs  
21 don't focus on this, but Mr. Papa made statements about the  
22 generics market, in which based on his knowledge and his  
23 experience and what he was exposed to, he understood that these  
24 products in the generic space were exposed to less competition  
25 due to relatively longer and more expensive development,

1 clinical trial and approval processes. I mean, that makes  
2 sense. That's logical. And so if prices were going up in a  
3 less competitive market, that made sense.

4 On August 5th they point to this on page -- slide 22,  
5 that Mr. Papa said, Our team has done a great job at looking at  
6 pricing. And that -- across that portfolio we think there is  
7 still opportunities to do pricing.

8 They claim that's misleading, your Honor. That's  
9 misleading. Our team has done a great job at looking at  
10 pricing.

11 It sounds like an opinion to me about trying to give a  
12 compliment to your team. And then so across that portfolio we  
13 think that there is still opportunities to do pricing. I think  
14 it's okay to look for opportunities to do pricing even in a  
15 market that's hard to do pricing. Because there are less  
16 competitors doing it.

17 On slide 23 he was then shown this document. This is a  
18 month and a half later. It was September 13th. And this is  
19 what the plaintiffs point to as proof that when he said our  
20 team has done a great job looking at pricing and we think there  
21 is opportunities to do pricing, that he was misleading the  
22 market intentionally.

23 They point to this email in which he is copied on it.  
24 It contains a slide deck. And on one of the slides it says,  
25 business dynamics. And there is a bullet that says, Minimal

1 price increase opportunities.

2 Well, that meant they were looking for opportunities.  
3 And there were minimal price increase opportunities. Entirely  
4 consistent with what he said six weeks before or so. And  
5 that's what he testified to, but they are pointing to it as if  
6 it's misleading and it boggles the mind as to how they have  
7 that theory, why that works.

8 Turning next to this issue, and this issue is one that  
9 we've struggled with because Mr. Papa has been consistent from  
10 the beginning of this case. They have been consistent in  
11 misreading his statements. And this has happened over and over  
12 again, so I'm glad we get a final chance to show your Honor  
13 what the evidence shows.

14 They claim that Mr. Papa represented to the market --  
15 this is on, I believe, slide 24 -- that Mr. Papa represented to  
16 the market a pricing goal, specific each of the six generic Rx  
17 products at issue. And they claim that he represented a goal  
18 for the broader generic Rx market. I mean that's what they  
19 allege. Repeatedly, as Mr. Papa testified, when he talked  
20 about pricing, he talked about it on a portfolio-wide basis.

21 Now, don't take my word for it. We're about to turn to  
22 the evidence that shows it over and over and over again. And  
23 they disregard this, so I'm hoping today they will confront  
24 this and they will address this with your Honor. And they will  
25 explain to your Honor why on February 5, 2015, when Mr. Papa

1 said, first comment I offer is that across the total Perrigo  
2 portfolio, our goal is always to keep pricing flat to slightly  
3 up.

4 I'd like them to explain to you today why that doesn't  
5 mean it is across the total portfolio. May 12, 2015, Bank of  
6 America conference. I challenge them to explain why this  
7 statement, our approach in our total business is to keep our  
8 pricing flat to up, slightly. Why he is not talking about the  
9 total business?

10 June 2, 2015, he says it again. We -- the approach we  
11 take on pricing is really a portfolio approach, across all the  
12 Perrigo segments. I think he is being quite clear, but let's  
13 see if there is something else.

14 Next slide, 26, June 2, 2015, this is during the class  
15 period, now in any individual category like Rx there may be  
16 more upside. I will say over the last several years, to be  
17 fair, there has been more pricing upside in the Rx category  
18 than perhaps some of the other categories. But we still take  
19 that kind of total portfolio view of keeping pricing flat to up  
20 slightly as a view.

21 And the Goldman Sachs conference, January 5, 2016,  
22 again, bookends to this entire class period. He is again  
23 saying, it is across the total portfolios.

24 What do they do?

25 Your Honor, in their brief, and I really wish I had



1 blown up their brief, but you know what? I will turn to the  
2 page. It is their opposition brief to the motion for summary  
3 judgment. It's on page 55 and these pages, absolutely shocking  
4 to me when I read them. Page 55 and 56. And we will put it  
5 up, and we will blow up the evidence of what they are trying to  
6 persuade your Honor to do.

7           They turn to these words right here on page 55 of their  
8 brief, their opposition brief at page 55. And they say these  
9 are the words that Mr. Papa said. And they say, quote,  
10 defendants Papa and Perrigo said the strategy was applied not  
11 just on a portfolio-wide basis, but at product, category, and  
12 business segment levels.

13           And that's the words they quote to your Honor.

14           Page 55. They go on to say, defendants argue that Papa  
15 meant something other than what he actually said. Now they are  
16 telling your Honor that Mr. Papa, when he says it is across the  
17 portfolio pricing, he is not telling the truth. And this a  
18 jury question. In fact, their next sentence, however, quote,  
19 That is an issue for trial. Okay. What did they leave out for  
20 your Honor?

21           Let's go to the next slide.

22           How about the previous paragraph, your Honor, where it  
23 explains exactly what he is talking about which they don't  
24 point you to? Quote, On the question on pricing, certainly we  
25 see that out in the marketplace, but I would remind the

1 audience today that what we've always said about pricing is  
2 that our pricing across our total book of business is flat to  
3 up slightly.

4         Let them come up and explain why they left that out on  
5 page 55. Why they think that's a triable issue, when in that  
6 paragraph and the one right below it, he says very clearly, I'm  
7 talking about our look at our total portfolio and that explains  
8 exactly the statement that they cherry-picked out, -- which now  
9 you can see means whether we're talking about any specific  
10 product, or any specific category, or any segment of our  
11 business; the overall comment, the overall portfolio comment --  
12 is flat to up slightly for our pricing.

13         Can there be any reasonable doubt about that? If this  
14 is a reasonable doubt standard, there would be no question we'd  
15 win. It is a much lower standard for us. Much higher burden  
16 them to show somehow this is significantly probative when they  
17 cherry pick a portion of the statement and they think that's up  
18 to the jury to decide.

19         Your Honor, they completely are taking out of the  
20 meaning of the plain language. Now, let me go to the next  
21 issue, which is Omega integration.

22         They can't prevail on these claims with respect to Omega  
23 integration for substantially the same reasons that they can't  
24 prevail on their other claims, because they are just taking  
25 things out of context and they are not looking at the record

1 evidence. But we have the record evidence and we want to give  
2 it to your Honor.

3 The plaintiffs have failed to establish that any of  
4 Mr. Papa's statements somehow were false or misleading, or  
5 presented somehow a false or misleading picture by suggesting  
6 somehow he omitted that there were serious impediments to  
7 integration.

8 Okay. Let's test out their theory.

9 If we turn to slide 30, I would like to talk about  
10 slide 30 and 31 briefly.

11 Because in the context of Omega integrations, they keep  
12 saying the public -- because they care about the public, what  
13 did the public know during the class period? I mean, as a  
14 federal prosecutor, when I was prosecuting securities fraud,  
15 that's what I cared about. What does the public know? Did  
16 they receive the information they needed to assess the total  
17 mix of information to figure out whether or not somebody should  
18 buy or sell a security?

19 Okay. They say Omega integration was troubling. They  
20 say it was troubling --

21 They say Omega integration, people should have been told  
22 it was plagued with systemic problems. Now, really, the  
23 problems they were plagued with, which we are about to see, are  
24 HR problems, IT problems, not commercial problems. I mean,  
25 between us, what does the investor care about, whether the IT

1 is integrating, whether the HR departments are getting  
2 together, or whether the commercial synergy is effective? The  
3 investor cares whether or not the commercial synergies are  
4 effective.

5 But put that aside. Even if you put that aside, on  
6 slide 30 and 31 we've excerpted out from the public filings  
7 what they want to avoid focusing on, February 5, 2015,  
8 Perrigo's Form 10K; April 29, 2015, Perrigo's Form 10Q;  
9 August 13, 2015, Perrigo's annual statements; February 25,  
10 2016, Form 10KT.

11 What does it do? It warns every investor that Omega  
12 integration combining two businesses is complex. It's costly.  
13 It is time consuming. It has lots of difficulties. It is  
14 unpredictable. It could be challenging. What investor doesn't  
15 know this after reading all of these public filings?

16 Let's look at what they actually point to and at this  
17 point, I think I would like to hand up to your Honor the stack  
18 of documents, the -- I have two copies. Everybody -- my worthy  
19 colleagues to the right and my worthy colleagues to the left  
20 all have copies of this because these are the statements and  
21 documents that the plaintiffs rely on for support that Mr. Papa  
22 made false and misleading statements.

23 And I think we identified them all. They will tell us  
24 later today if we didn't, but I would like them to explain why  
25 these show Mr. Papa was being misleading.

1           They focus on Mr. Papa's statement on April 21, 2015,  
2   slide 33, and they say that Mr. Papa was deceiving the  
3   marketplace when he said 22 days after the March 30th closing  
4   of the acquisition of Omega, quote, We are very pleased with  
5   our initial integration projects with Omega. So there is a lot  
6   of good activities happening with the integration team.

7           They say that was false and misleading for him to say we  
8   are very pleased and a lot of good activities are happening.

9           Okay. Let's look at their proof.

10          They point to this document on slide 34, a canceled -- a  
11   January 2015 email, preclosing, and they say that Mr. Papa  
12   should have learned about this, that somebody at Perrigo -- at  
13   Omega was canceling a weekly call to plan integration that they  
14   were going to start in March. This is one of their documents  
15   they say proves Mr. Papa was somehow misleading.

16          I'm sorry. It does not. All it does is talk about  
17   planning and somebody canceling a weekly call. That does not  
18   mean that Mr. Papa's statements in April were false about being  
19   pleased.

20          Slide 35, they cite an email, again, prior to March 30th  
21   closing, in which they say in this email, and we handed up a  
22   copy to your Honor, that it raises concerns because they are  
23   missing budget from the last year. So in 2014 they missed  
24   budget.

25          I'm sorry. That does not make Mr. Papa's statement, We

1 are very pleased with our initial integration project with  
2 Omega, a lot of good things are happening with the integration  
3 team. I don't see the connection. There is zero connection to  
4 that.

5 So let's go to the next document they point to,  
6 slide 35 -- that's slide 36. They point to this document.

7 They say -- and let me get this exactly accurate. This  
8 is an email that raises unspecified -- so it is from  
9 Thomas Farrington to Joseph Papa, Thomas Farrington being in IT  
10 department. I think he had the title of chief information  
11 officer. He was involved in integration, and he emails  
12 Joseph Papa on April 8, 2015, Omega integration concerns, and  
13 he says, Joe, Mike, and that refers to Mike Stewart, and I had  
14 a few meetings today on a few matters. He referenced that some  
15 integration concerns were shared by Barbara and Marc -- that's  
16 Marc Coucke and Barbara being his -- one of his executives --  
17 that you and he had some discussion around.

18 They point to that and they say, Well, when Mr. Papa  
19 says he was pleased with all the activities with integration,  
20 that meant he was lying.

21 There is no connection there. There was no connection.

22 What was the testimony? Mr. Farrington testified he  
23 didn't know what those matters were referring too, but what he  
24 thought in his testimony was that Mr. Coucke complained about a  
25 lot of the added work. Mr. Hardiman already talked about how

1 Mr. Coucke had temper tantrums, and now he is complaining about  
2 a lot of work.

3 Mr. Papa testified he didn't recall the specifics, but  
4 he did recall concerns about functional group integration.

5 What was that? HR, IT, not commercial problems.

6 So let's go to the document they rely on.

7 Slide 37, in the packet we gave you, your Honor, and we  
8 urge your Honor to look at the packet, this is their document  
9 that they rely on. It is an April 10, 2015, PowerPoint that  
10 Mr. Papa received, and they say this PowerPoint proves that  
11 Mr. Papa was lying when he said good things, good activities  
12 are happening with integration or that there are, you know, a  
13 lot of initial integration projects.

14 Really? I mean, I will just point out one slide within  
15 the slide, slide 37. This is slide 23, bottom left-hand  
16 corner.

17 When I look at that, I look at a list of a lot of  
18 integration projects. When I look at some of the headline news  
19 here about some of the progress they are making, what I see is  
20 a lot of good activities happening with the integration team.  
21 What Mr. Papa said was true, and what they are doing is  
22 misleading.

23 Slide 38, it is the same -- it is the April 14, 2015,  
24 PowerPoint, and it identifies positive results of initial  
25 integration projects, something Mr. Papa received, and we've

1 highlighted the slides.

2 Again, I challenge and ask the plaintiffs to point out  
3 why that is not proof that Mr. Papa was making a truthful  
4 statement and he wasn't being materially misleading.

5 Finally, I will put this up because they point to this  
6 repeatedly. This is the one they rely on repeatedly,  
7 your Honor, and this is on slide 39. It is in your packet. It  
8 is Thomas Farrington's May 26, 2016, document.

9 Now, why is it important?

10 Mr. Papa is no longer at Perrigo. So he had left, and  
11 the chief information officer, I believe is the chief  
12 information officer involved in IT, Thomas Farrington, who  
13 testified, was doing sort of a postmortem with the benefit of  
14 hindsight and he singularly focused on IT because that's his  
15 area. Commercial stuff he doesn't know about, but IT, back  
16 office, that's his thing, and he had some criticisms for  
17 Joe Papa.

18 Joe Papa is the missing guy in the room. He is no  
19 longer there. He is over at Bausch Health, otherwise,  
20 previously known as Valeant, and he is criticizing some of  
21 Joe's decision-making, but nowhere does he say anywhere here  
22 that there were serious impediments. Nowhere does he say  
23 anywhere here there is anything to do with commercial  
24 integration. Again, this is 2020 hindsight after the fact.  
25 That's what they rely on.



1           Now, they also point to the statement on slide 40.  
2       Mr. Papa's statement, which people have already gone over so I  
3       will just be very brief on it, 22 days after closing, Mr. Papa  
4       confirms and says to the public that Omega has been accretive  
5       to our growth rate.

6           Your Honor, I do want to briefly describe Omega is in  
7       Europe, many, many countries, I believe over 30. Perrigo  
8       didn't have a presence in Europe. They had a presence in the  
9       United States. They had a presence in other countries, but  
10      they had no presence in Europe. This was an opportunity to  
11      take Perrigo's products and have a distribution throughout  
12      Europe, and then Omega was a billion-dollar plus company to  
13      have Omega products distributed in the United States and  
14      elsewhere in the country and what he said has been accretive to  
15      our growth rate was true. It was accretive to the growth rate  
16      and on slides 41, 42, 43, we prove it.

17           I will go quickly to slide 43.

18           Slide 43 was a document Mr. Papa received on April 19th,  
19      and it proves that it was accretive. It has the proof right  
20      there. So when Mr. Papa is making the statement on April 21st,  
21      a few days after receiving this document, that it was  
22      accretive, how could somebody say he doesn't have knowledge  
23      that it is accretive? I mean, the document he receives says  
24      Omega is accretive.

25           So when Mr. Papa made the statement, even if they could

1 somehow prove that wasn't true -- I believe it is factually  
2 true -- even if they somehow prove it wasn't true, Mr. Papa  
3 believed it. He received the information that said it. I  
4 would like them to point out to your Honor, when they come back  
5 up here, on slide -- this slide, this particular slide, I  
6 believe it's 43, I would like them to explain to your Honor why  
7 Mr. Papa receiving this email saying Omega is accretive doesn't  
8 completely wipe away their argument that Mr. Papa was somehow  
9 materially misleading when he repeated it to the public a few  
10 days later.

11 Finally, we have some other slides, some additional  
12 remarks that Mr. Papa makes over and over again, the same sort  
13 of information. I'm not going to -- I realize I'm short on  
14 time.

15 On slide 47, I don't need to restate how Mr. Hardiman  
16 very effectively portrayed and accurately portrayed  
17 Mr. Coucke's temper tantrum. It was a temper tantrum. It was  
18 about how he didn't want to be given a lot of work. He was  
19 tired of being told by, you know, the new boss, the new people  
20 in charge, what to do. That's all it was.

21 Mr. Papa testified on slide 48, we excerpted it, about  
22 the challenges of integration. What he said and made very  
23 clear was that commercial groups were the ones that generate  
24 the revenue and that was going well. That's what the investors  
25 were focused on.

1 Slide 49, they claim this was a false statement.

2 Mr. Papa made this statement on September 17, 2015. He said,  
3 We supplemented it with our manufacturing infrastructure so we  
4 brought some manufacturing expertise.

5 There is -- that is accurate.

6 On slide 50, Mr. Papa focused on the long-term. He said  
7 to the public from September 17th, that Morgan Stanley  
8 conference, the Perrigo/Omega integration will take two, three,  
9 four years. It is not going to be done right away, and he was  
10 very clear about that. They were very clear about that in the  
11 public filings.

12 On slide 51, on the same call, Mr. Papa provided an  
13 example of Perrigo's supplementation Omega with manufacturing  
14 expertise. I will spare you the details, your Honor, but he  
15 explains to the public why he believes Omega is going to  
16 provide this. You know, he is going to supplement Omega with  
17 manufacturing expertise because he was able to acquire some  
18 other brands from another company and use Omega's distribution  
19 network to further sell it.

20 So it was a true statement.

21 Finally, your Honor, and we proved it with some of our  
22 slides, the plaintiffs offer some evidence with respect to  
23 Ms. Kincaid. I think Mr. Wareham explained why that's no  
24 longer valid, and then I would like to just turn to one final  
25 slide on 55.

1           The plaintiffs -- this is another one of those things  
2 where if you don't really look carefully at the documents, you  
3 might miss how I think the plaintiffs are misinterpreting -- is  
4 that a nice way of putting it -- misinterpreting the record.

5           Here is an example where the plaintiffs claim that  
6 Mr. Papa removed slides from a board presentation that  
7 Mr. Coucke was going to make in the class period in the summer  
8 of 2015, and that was somehow nefarious and that somehow  
9 prevented Mr. Coucke from giving full information to the board.  
10 I'm not a hundred percent sure.

11           What actually happened? Well, if we look at the record,  
12 and we put the exhibits in the bottom of the page,  
13 Mr. Farrington emailed Mr. Papa July 30, 2015. This is the  
14 same Mr. Farrington who after the fact had the postmortem from  
15 the IT perspective, and he said, Given the 30-minute window,  
16 they don't have much time with the board. I suggest we  
17 eliminate these slides and begin at slide 20.

18           Okay. Proof. Contemporaneous evidence, it was  
19 Mr. Farrington and not Mr. Papa who suggested removing the  
20 slides.

21           Next, Mr. Farrington testified, Despite the removal of  
22 the slides, we presented the information as I am reviewing the  
23 deck that Marc presented as well as the points that we had a  
24 minimum raised verbally with Marc.

25           And who presented it? It was Mr. Coucke who presented

1 it, and Mr. Coucke fully agreed with these slides he says to  
2 Tom, not to Joe but to Tom, talking about the slides. So it is  
3 just another short example of where the plaintiffs have  
4 misconstrued the factual record.

5 Your Honor, it is very easy for somebody to say,  
6 you know, these documents, we point to this evidence. We point  
7 to this statement. Leave it up to the jury, but that's not the  
8 standard. That's what they are asking you to do.

9 Mr. Papa has been in this industry, healthcare industry,  
10 for decades. He doesn't deserve to be accused of this at the  
11 outset, but that's fine. That's what discovery is for, to test  
12 the waters, to depose people, to collect the evidence and then  
13 to question Mr. Papa, and now they have done that. They have  
14 had that opportunity, and they don't have the evidence to meet  
15 the summary judgment standard.

16 We would ask your, Honor, really, really important, we  
17 would ask your Honor to dismiss all the claims against  
18 Mr. Papa, all the claims. He should not be before this Court.  
19 He should not be any longer a defendant in this case.

20 Your Honor, I'm happy to answer any questions. I thank  
21 you so much for your time.

22 THE COURT: Thank you, Counsel. No questions at this  
23 time.

24 I note when counsel came up he mentioned to the group  
25 about a break. It seems like this will probably be a good time

1 for a break.

2 It is 12:26. I don't know what ideas the parties had  
3 for a break. Do you want 45 minutes for a break and make it a  
4 lunch break and come back at that time?

5 MR. SILVERMAN: That's fine, your Honor.

6 THE COURT: And we're going to make ourselves  
7 available for you today. So you don't have to be so concerned  
8 about time frames in terms of when we will be finishing today.

9 THE COURTROOM DEPUTY: All rise.

10 (Luncheon Recess taken from 12:27 to 1:30 p.m.)

11 THE COURTROOM DEPUTY: All rise.

12 THE COURT: Please be seated.

13 Are we ready to proceed?

14 MR. SILVERMAN: Yes, your Honor. Good Afternoon, your  
15 Honor. Josh Silverman for the plaintiffs. I'll address most  
16 of the liability issues before us this afternoon.

17 My colleague, Mr. Harrod, will address loss causation  
18 and Daubert issues.

19 First, I would like to thank your Honor for giving us  
20 the time today to explore these issues, and to thank you for  
21 your patience in wading through the several hundred pages of  
22 briefing and statements of fact, not to mention the roughly  
23 14,000-page record.

24 To thank Judge Wettre, who is no longer here, but I  
25 would like to pass on our thanks to her for shepherding the

1 case through discovery and trying to assist the parties in  
2 attempts to mediate.

3 Prior to our break, defendants spent about two,  
4 two-and-a-half hours telling your Honor what sounded very much  
5 to me like how they would present their summation at trial to a  
6 jury. They talked extensively about what inferences should be  
7 drawn from the documents, what defendants, or Mr. Coucke,  
8 really meant when they wrote the words that are in the  
9 documents in the record. Or why defendants' self-serving  
10 denials of wrongdoing should be weighed more heavily than  
11 contrary evidence in the record.

12 They even asked for an inference to be drawn in their  
13 favor based on the amount of deposition time for Mr. Papa. Of  
14 course, they didn't mention to your Honor the reason his  
15 deposition was cut short was because he answered, I don't  
16 recall, 120 times; I don't recall or I don't remember, and he  
17 answered, I don't know, 65 times.

18 My guess is that he will find a cure to his memory  
19 ailment by the time we get to trial, but if not, the jury is  
20 the deliberative body that is charged with assessing his  
21 reaction to the questions and determining whether that's honest  
22 or dishonest. Credibility is always an issue for the jury.

23 Defendants also described through their cherry-picked  
24 evidence what sounded very much like a different company than  
25 the record actually shows. They did not mention at all that

1 Perrigo wrote down over \$2 billion for Omega. Instead they  
2 described it as almost trivial IT problems and HR problems in  
3 integration.

4 Well, those problems don't require a \$2 billion  
5 write-down. The record here reveals something far greater.  
6 They also glossed over that Perrigo's own competitor said it  
7 conspired with Perrigo to fix prices, to rig bids, to allocate  
8 markets. That's not something you saw in any of the cases that  
9 were cited by either party in the respective briefs on  
10 collusion.

11 They also ignored that Papa and Brown were both told  
12 before the class period that the windfall pricing that had  
13 driven generic prescription drug results, making it the most  
14 profitable division at Perrigo, would peak by 2015, just as it  
15 actually turned out to do. They hid all of this information  
16 from investors. They spoke to investors extensively about  
17 these topics, but hid all the damaging information.

18 We understand that defense counsel have their own spin.  
19 They have their own story to tell. They have their own  
20 inferences that they believe should be drawn from the evidence,  
21 but that's exactly what trials and juries are for. It is not  
22 what summary judgment is for.

23 As the Third Circuit has made clear, Rule 56 serves a  
24 very limited purpose. It cannot apply, whereas here the  
25 nonmovant has proved more than a mere scintilla of evidence



1 supporting its claims. That is the *E.D. v. Sharkey* case.

2 It cannot be use to draw inferences in favor of the  
3 movements. All inferences must go to the nonmovant at summary  
4 judgment. That is the *Marino* case, also in *Nathanson*. It  
5 cannot be use to resolve credibility issues or to weigh  
6 evidence, *Marino* again. And it cannot be granted if there is a  
7 disagreement over what inferences can be drawn, even if the  
8 facts are undisputed. That is the *Nathanson* case.

9 Here the facts are deeply disputed. Credibility needs  
10 to be assessed. It is a very big issue, especially for  
11 somebody like Joe Papa and Judy Brown. The evidence must be  
12 weighed; that can only be done at trial. A few highlights of  
13 the evidence that was either spun in a way that is unnatural  
14 and unreasonable, and that we think that jury will be given its  
15 plain meaning, or was unmentioned altogether by my  
16 counterparts.

17 Even before the class period defendants were warned  
18 about problems with Omega. The pre-acquisition due diligence  
19 by PricewaterhouseCooper -- that was a company hired by  
20 Perrigo -- suggested that Omega's revenue was inflated by about  
21 200 million Euros. That is something PWC called in a report to  
22 Ms. Brown negative revenue sensitivities, that's Exhibit 259.

23 Perrigo also developed with its banker, JP Morgan,  
24 something it called a deal model, which documented the baseline  
25 expectations and told Perrigo, as it integrated the company,

1 whether Omega was performing according to the metrics that the  
2 board of directors at Perrigo considered, when it approved  
3 making a bid for Omega in November of 2014.

4 But it didn't meet those. And it did not meet the deal  
5 model before the class period or during the class period. The  
6 deal model itself is expressed in Exhibit 360. It is  
7 documented there. Something that was sent to Papa and Brown,  
8 so they had actual knowledge of this baseline and it was  
9 something, of course, that Papa considered as a director when  
10 -- in late 2014 when the board was deciding to bid for Omega.

11 By February 2015, emails sent to Papa and to Brown  
12 admitted that Omega's performance had deteriorated severely and  
13 that Omega was not meeting the deal model. It is Exhibit 162.  
14 And defendants concede in the paragraph 49 of their statement  
15 of facts -- I was surprised to see this -- but they concede  
16 that Perrigo's vice president of finance, Ron Winowiecki told  
17 Brown that his biggest concern -- that was his words at the  
18 time -- his biggest concern what that upon integration, Omega  
19 would no longer be able to boost its earnings with what he  
20 called extraordinary items. That's Exhibit 35.

21 As my counterpart said, the reason why they couldn't do  
22 that is that GAAP does not allow that kind of accounting  
23 manipulation. A few days later, Brown responded to Mr.  
24 Winowiecki -- this is in February 2015 -- that she could not  
25 agree more about that concern. And she called it -- she called

1 Omega's use of extraordinary items to boost its accounting an  
2 immediate flag. That was her words at the time.

3 She said it required the involvement of Joe Papa. That  
4 was her words at the time. And she said it would probably be a  
5 painful part of finalizing goals. All of that is in Exhibit  
6 164.

7 Now, over the coming month PricewaterhouseCooper and  
8 Perrigo's interm finance staff debated extensively about  
9 Omega's inflated revenue. It's documented in a lot of the  
10 documents before your Honor, such as 83, 192, 441. All of this  
11 was omitted from investors when they made their positive  
12 statements about Omega.

13 Now, on May 6, 2015, Perrigo's vice president of  
14 finance, Mr. Winowiecki, sent an email to Papa and Brown,  
15 warning that Omega's second quarter 2015 EBIT was going to be  
16 13.6 percent below the deal model. They didn't come out and  
17 tell investors Omega is not performing the way that we  
18 expected. They continued to make positive statements. And  
19 that is documented in Exhibit 53.

20 Now, we get to very close to where Ms. Brown made her  
21 statements about things being in line and going smoothly.

22 She made those on June 23, 2015. Let's talk about what  
23 actually happened, and what a reasonable jury can consider, and  
24 what inferences they can draw because, remember, they are  
25 obligated -- that the Court is obligated at this stage in the

1 litigation to draw all reasonable inferences in favor of  
2 Plaintiffs, the nonmovant.

3         On June 17th, six days before Ms. Brown's statement,  
4 Omega CEO Coucke erupted in a Perrigo executive committee that  
5 both Papa and Brown attended. What he said at that committee  
6 was that, quote, Nothing was working right with the  
7 integration, end quote. He didn't say commercial integration  
8 is going swell, but we have the tiny IT problem or a tiny HR  
9 problem. He said nothing was working right. A reasonable jury  
10 can take that plain statement for its plain meaning.

11         Farrington, who was at the meeting, confirmed these  
12 statements. Let's be clear about what Mr. Farrington's role  
13 was. He was the chief information officer; that is true. That  
14 was one of the hats he wore, but the other hat he wore is that  
15 he was the head of the integration management office. And he  
16 was hand-picked by defendant Papa to be effectively Perrigo's  
17 integrations czar for the Omega integration.

18         The fact that Mr. Farrington confirmed, and Mr. Coucke  
19 said at a meeting attended by Ms. Brown and Mr. Papa, that  
20 nothing was working right with the integration completely  
21 undermines Ms. Brown's claim to this Court that there is no  
22 evidence that anybody actually raised integrations concerns to  
23 her. She asserts on page 11 of her reply brief.

24         The very next day, June 18, 2015, Farrington and Coucke  
25 agree that Perrigo and Omega need marriage counseling. That is

1 Exhibit 60, and I think there is another copy in the record at  
2 Exhibit 180.

3 In that same exchange Coucke says, that the integration  
4 problems have made it impossible to run his business. Thus,  
5 linking both the integration and the performance. It is the  
6 integration problems that are hurting the business itself.  
7 Mr. Coucke said that. There is no evidence whatsoever to the  
8 contrary. And even if there was mixed evidence -- which there  
9 isn't here -- all inferences at this stage need to be drawn in  
10 plaintiff's favor. That's what the Third Circuit requires.

11 He also said, Mr. Coucke also said, Omega was out of  
12 oxygen fighting off Perrigo's demands for unusual integration  
13 measures. We know this was forwarded to Ms. Brown because the  
14 metadata from the production where they produce the documents  
15 to the plaintiffs indicates that Ms. Brown was the custodian of  
16 this document.

17 Five days later, Ms. Brown speaks to investors at an  
18 analyst conference. Instead of telling them the truth that  
19 there were some hitches in integration, she says integration is  
20 proceeding in line. And she says that back office  
21 integration -- and that, of course, is the thorny issue of  
22 resolving Omega's accounting into GAAP compliance and building  
23 a forecast process that was missing -- was going smoothly.  
24 Those were her words as set forth in Exhibit 63.

25 Two days later, two days, Ms. Brown writes to Omega CEO

1 Mr. Coucke suggesting that she fly to meet him at Brussels --  
2 in Brussels, where he resided -- to discuss, quote, concerns he  
3 raised at the EC -- that's executive committee -- and also with  
4 her one on one. That is Exhibit 206.

5 A reasonable jury can consider to you don't need to fly  
6 halfway around the globe to discuss concerns if there were no  
7 concerns. You don't need to fly halfway around the globe to  
8 discuss integration problems if it's going smoothly, and it's  
9 in line. It wasn't.

10 July 12, 2015, only a couple weeks later. An email to  
11 Brown warned Omega's cash flow was a business problem and that  
12 it manipulated Q2 earnings with a factoring scheme to conceal  
13 an earnings miss. That's Exhibit 212. Four days later,  
14 Perrigo held an integration reset meeting with Omega in London,  
15 that was discussed in advance with both Papa and Brown. That  
16 discussion is documented in Exhibit 386.

17 Of course, a reasonable jury can consider and the  
18 inference must be drawn at this stage, that you don't need to  
19 reset a process that is going in -- that is in line or going  
20 smoothly. That's not what a reset is. Written materials from  
21 the reset meeting described integration as, quote, chaos, and,  
22 quote, promises broken. The exact opposite of what Ms. Brown  
23 described to investors. It warned that there was a lack of  
24 trust. That's Exhibit 195.

25 What did Mr. Farrington say, who was at this meeting?

1 He said that the meeting gave Perrigo, quote, Clear indications  
2 of problems relative to controls, risks, and scaling at Omega,  
3 but Perrigo, quote, Did not act on our convictions, end quote.  
4 That's Exhibit 84.

5 On July 20, 2015, four days later, they have the  
6 quarterly business unit review. That is attended by Brown and  
7 Papa. And at that review that discussed multiple accounting  
8 anomalies according to Exhibit 213. Those anomalies were  
9 identified through the integration of Omega's accounting into  
10 Perrigo's financial reporting controls. That is what led to  
11 the internal audit that I will be discussing with your Honor a  
12 little bit later.

13 On July 23rd, three days later, Mr. Winowiecki, the vice  
14 president of finance, emails brown about how severely Omega was  
15 deviating from the deal model. He noted that the deal model  
16 called for 12 percent growth in 2015, but Omega wasn't growing  
17 at all. It was at negative 9 percent in Q1. That's Exhibit  
18 390.

19 Now, if Perrigo's own documents say Omega was in -- was  
20 at -9 percent in Q1, how could Omega -- how could Perrigo  
21 possibly claim to investors after Q1 that it was accretive to  
22 growth. It wasn't growing according to Perrigo's own analysis.  
23 That's Exhibit 390.

24 Now, only two weeks later on August 5, 2015, on a  
25 conference call with investors, defendant Papa says, that

1 Perrigo has already, quote, Delivered on our Omega integration  
2 plan. A reasonable jury need not accept this lie as truth. In  
3 fact, as Perrigo's own documents admitted in May 2016, even by  
4 that time Omega was never fully integrated. That's Exhibit 83.  
5 And while speaking positively about Omega, Papa hid from  
6 investors the very concerns discussed internally only weeks  
7 before about Omega's accounting manipulations.

8 Another presentation dated September 14, 2015, showed  
9 that Omega's revenues and operating income had worsened in  
10 August. That's Exhibit 309. Now, remember, all of this time  
11 between April and November, Perrigo is doing one main thing.  
12 It is fighting off a takeover bid, a hostile takeover bid from  
13 Mylan. And defendants say, well, that Judge Arleo did not  
14 accept that as a motive for scienter at the pleading stage.  
15 It's true she didn't accept it as an independent motive. But  
16 now the record's developed evidence that Mylan -- that fighting  
17 Mylan, in fact, was the main focus of the company. It was  
18 something that Brown and Papa spent an enormous amount of time  
19 on. And we will see later on that Mr. Coucke himself says that  
20 Omega was asked by Perrigo to stretch its guidance to fight off  
21 the Mylan bid.

22 Things grew even worse in October. Kirsten Young would  
23 not expertise Perrigo's guidance. Now, this matters because of  
24 the takeover bid. The Irish takeover rules, they require that  
25 an accounting firm expertise guidance as well as the board of



1 directors, and that they faithfully revealed to investors what  
2 the assumptions are that go to that guidance, et cetera.  
3 That's Exhibit 397, is the communication describing  
4 Mr. Winowiecki's concerns to Ms. Brown.

5           October 8, 2015, Brown pressed Coucke about whether  
6 Omega's miss was related to having previously used the Belgian  
7 generics unit to do sales. And Coucke responded that the  
8 situation with the Belgium generic unit, quote, Has been  
9 discussed in detail several times with Joe Papa on our weekly  
10 calls. And he also said with respect -- this is with respect  
11 to the dialogue between Omega and Perrigo, he said Omega,  
12 quote, Can't be more transparent. That's Exhibit 371.

13           Perrigo was not equally transparent with its investors.  
14 It said nothing about the accounting manipulations at Omega.  
15 It said nothing about the integration problems that were  
16 described to it.

17           October 15, 2015, only one week later, Coucke wrote to  
18 Joe Papa begging him, quote, Not to push nonrealistic guidance,  
19 and warning Papa that they were engaged in, quote, Extreme  
20 guidance stretching, end quote. It is Exhibit 238.

21           This pushback made Brown furious. She wrote in an email  
22 to Papa and others that she had no idea what Omega was going to  
23 put into the numbers that had to be expertised the following  
24 week. And that she was, quote, personally feeling very  
25 exposed, Exhibit 182.

1           On the 18th, October 18, 2015, four days before Perrigo  
2 published its official guidance, a draft internal audit report  
3 confirming the accounting manipulations was distributed to Papa  
4 and to Brown. It's Exhibit 213. It found that at the end of  
5 the second quarter, 2015, remember, this was the only quarter  
6 that they could mention that had results which were even  
7 nominally accretive.

8           It found that quarter was manipulated by what -- what  
9 the internal auditors called a loading practice. That is a  
10 fancy word for channel-stuffing with its generic distributor  
11 for Bellco. And that manipulation was done because, quote,  
12 Perrigo expected a big quarter from Omega, end quote. Exhibit  
13 213.

14           So Perrigo applied the pressure and got the result that  
15 its pressure caused. The following day, October 19, 2015, only  
16 three days before the guidance was published, Papa and Brown  
17 discussed the internal audit findings. And on the 20th, only  
18 two days before, they met with the audit committee to discuss  
19 those findings. That's Exhibit 402 and Exhibit 216.

20           Nevertheless, when they published their guidance, they  
21 said absolutely nothing about this. Incredibly, it all --  
22 Perrigo also hid these problems from Ernst & Young, the  
23 auditors it hired to expertise the guidance, the external  
24 auditors. And the deposition in this case, because somebody  
25 from Ernst & Young said as their representative witness, the

1 Ernst & Young partner who was involved in this said he was  
2 astounded when he heard that -- saw the audit committee  
3 findings saying that's the first he ever heard of it. That is  
4 Exhibit 167, is his deposition.

5 Not telling the truth about what was going on at Omega  
6 served its purpose, Perrigo defeated the hostile tender offer  
7 on November 13, 2015. And wouldn't you know it, Brown and Papa  
8 immediately sought to sell their personal shares at prices even  
9 lower than they had just told investors what's too low for  
10 investors to depart with their own shares. Papa said about  
11 dumping shares at \$140, as you can see in his form 4s that are  
12 in the record at Exhibit 6 and 196 and deposition testimony and  
13 Exhibit 169, pages 107 to 110. Brown likewise said that she  
14 planned to, quote, Sell all vested, restricted, and performance  
15 shares right after the Mylan offer collapsed. That's Exhibit  
16 299.

17 The next month, early December 2015, Winowiecki and  
18 Brown and Papa discussed the likelihood of an impairment at  
19 Omega. Quite frankly, it looks like it should have been -- it  
20 should have taken place earlier. A jury is entitled to draw  
21 the inference, and your Honor should at this stage, that it was  
22 time to coincide after the end of the Mylan tender offer.

23 The following days after those initial discussions,  
24 which were documented in Exhibit 410, Brown said she was  
25 apoplectic about Omega, and Papa was catatonic about Omega.

1 Perrigo's finance vice president said it looks horrible and  
2 that he had been warning about Omega since Q1 2015. In other  
3 words, he told them about the problems with Omega before the  
4 beginning of the class period. That is Exhibit 409.

5 From all of this evidence, a reasonable jury can  
6 determine that Perrigo and Papa and Brown knew that Omega was  
7 far worse than their optimistic statements described it to  
8 investors. Defendants wants to put their own spin on a  
9 particular sentence or two of this very damning evidence or to  
10 say that one document should be read in the context of another  
11 statement from another document. Well, they can put that spin  
12 on it at trial. Drawing inferences in the movant's favor is  
13 absolutely prohibited on a motion for summary judgment as the  
14 Third Circuit makes clear in these cases.

15 This is only a part of the evidence we outline in our  
16 brief at pages 23 to 31, showing that Papa and Brown were  
17 informed of the actual integration and performance problems at  
18 Omega that they withheld from investors. That's classic  
19 evidence of scienter. Additionally, Perrigo's integration are  
20 Tom Farrington, admitted in the candid postmortem that Joe Papa  
21 was not only aware of the problems with Omega integration, but  
22 he was a driver of it. That is Exhibit 181.

23 He said that Papa decided to forego crucial integration  
24 controls that were called must-haves that were adopted by  
25 Perrigo's executive committee in June 2014, then included deep

1 due diligence. According to Farrington's postmortem report,  
2 these were standards that Perrigo had decided it would always  
3 do for acquisitions, but, quote, Didn't do in this case at the  
4 CEO's direction. That's Exhibit 181.

5 Defendants tried to reimagine this document in their  
6 briefs. They say it was just aspirational or a gold standard,  
7 but that's not the words that the actual document use. The  
8 document called them must-haves, not might haves or  
9 want-to-haves or try-to-haves. It said there were things that  
10 Perrigo had decided it would, quote, Always do. Not might do  
11 some of the time or if convenient. A reasonable jury is  
12 entitled to take Perrigo's own words at their plain meaning.  
13 A reasonable jury can also consider that Brown even counselled  
14 Papa on how to manipulate the truth for Wall Street.

15 A text she met Papa right after they met with the audit  
16 committee to discuss Omega's accounting manipulations said,  
17 quote, Please think through your Wall Street answer as to  
18 whether this signals you plan to retire soon. And of course,  
19 we can never, and I emphasize that word because she used all  
20 caps in her text, we can never reference the reason underlying  
21 from weekend calls, even in one by one. That is Exhibit 289.

22 This scienter evidence, of course, has to be weighed by  
23 a jury. Scienter is a jury issue under the law in this circuit  
24 unless viewing all evidence and drawing all inferences in favor  
25 of the nonmovant no reasonable trier of fact could find the

1 element of scienter satisfied. It doesn't require a smoking  
2 gun as counsel said four or five times. That's not the case  
3 here. There is plenty of evidence from which a jury can draw a  
4 reasonable inference of scienter.

5 And let me be clear. They said strong inference time  
6 and time again in their briefs, but that's not the standard  
7 either.

8 The Bristol-Myers Squibb case that both sides cited to  
9 your Honor, that's at 2005 U.S. District Lexus 18448 at pages  
10 starred 43 to 44, reviews Third Circuit controlling law and  
11 says that a PSLRA implemented a heightened pleading standard  
12 that refers to strong inference, but that didn't alter the  
13 substantive standard at trial. The substantive standard it  
14 recognized was merely that a plaintiff, quote -- must, quote,  
15 Supply a basis from which to draw reasonable inference that  
16 defendants recklessly or knowingly issued a materially false  
17 and misleading statement. That's the standard before your  
18 Honor.

19 Defendants also speak about corporate scienter  
20 extensively in their briefs, and we also use that term in our  
21 briefs. But really, at the pleadings stage corporate scienter  
22 is a doctrine that's often used by courts in their  
23 descriptions. But at the proof stage, it's really just another  
24 word for indirect or circumstantial evidence. Of course, there  
25 is tons of cases that both sides have cited that scienter can

1 be shown by both direct and circumstantial evidence. There is  
2 no question about that, and the Supreme Court has made that  
3 absolutely clear.

4         So while there are certain -- almost all of our  
5 scienster, especially with respect to the Omega side of it, is  
6 thrown through direct evidence of what Brown and Papa were  
7 shown. A jury is also entitled to consider circumstances under  
8 which Brown and Papa routinely relied on the advice of other  
9 Perrigo executives who were on documents saying that they had  
10 knowledge of wrongdoing or of facts contrary to their  
11 statements to investors. That's something that a jury can  
12 consider as circumstantial evidence as long as the attenuation  
13 is not so attenuated that it's unreasonable.

14         On the generic drug cite, defendants also covered up  
15 problem with generic drugs. We assert three categories of  
16 misrepresentations on the generic drug site. Number one, they  
17 concealed that they relied on unsustainable super competitive  
18 practices. Number two, that they misrepresented Perrigo's  
19 generic drug pricing strategy. And number three, that they  
20 misrepresented the competitive environment to hide the fact  
21 that they were not actually competing on many key drugs.

22         None of these three categories hinge on proof of a  
23 Sherman Act violation. They cite a lot of Sherman Act cases.  
24 This isn't a Sherman Act case. We allege securities fraud in  
25 violation of 10b-5. Some of that security -- and 14(e). Some

1 of that securities fraud involves the concealment of  
2 unsustainable super competitive practices and illegal  
3 practices.

4 But they didn't -- they didn't come out and tell  
5 investors, We're engaged in this crazy pricing scheme, but it's  
6 just part of an oligopoly. It is not technically illegal.  
7 They just didn't say that at all. So they didn't tell the  
8 truth whether it was legal or illegal.

9 In terms of the -- and all of these three categories are  
10 also broader than the six to nine drugs that the defendants  
11 reference. In terms of the concealment of unsustainable and  
12 anticompetitive conduct, the evidence shows that at least in  
13 2013 to 2015, and it probably started as early as 2010.  
14 Counsel is right, that some of this does date back. But it  
15 really came to a head in 2013 to 2015 that Perrigo relied on  
16 massive super competitive price hikes to spike operating  
17 profits in it's most profitable decision, prescription generic  
18 drugs.

19 And when I say prescription generic drugs, your Honor,  
20 to be clear, I'm not talking about the Omega generic unit.  
21 Right now I am talking about domestic generic drugs, and I  
22 think so were my counterparts when they spoke about the generic  
23 unit. I am just not going to repeat that phrase over and over.

24 Record evidence shows that defendants understood these  
25 ploys were unsustainable regardless of whether they were



1 illegal or legal. On April 13, 2015, days before the class  
2 period, Papa and Brown conducted a three-day review, including  
3 what they called a domestic pricing review. That showed that  
4 before the class period Perrigo anticipated that the windfall  
5 domestic generic prescription drug pricing profits would peak  
6 in Q3, 2015. The pricing as a factor would peak in Q3, 2015,  
7 and turn and stay negative beginning in early 2016. Exhibit  
8 183.

9 And are there review slides that Papa and Brown  
10 personally reviewed or approved for this exercise, highlighted  
11 their pricing would turn negative by 2016 as well such as  
12 Exhibit 242.

13 As 2015 progressed, pricing deteriorated just as they  
14 expected before the class period, but didn't tell investors.  
15 Exhibit 245, July 2015 document sent to Brown and Papa showed  
16 that pricing was several millions worse than only a few months  
17 earlier. Exhibit 241. September 2015 update warned Brown and  
18 Papa that there were minimal pricing opportunities in generic  
19 prescription drugs.

20 Well, you heard Mr. Brodsky get up there. I believe it  
21 was Mr. Brodsky, and he said, there is a way to infer this  
22 that's non-culpable. If you say that minimal pricing  
23 opportunities doesn't mean the same thing as no pricing  
24 opportunities, then we were free to hide this to investors and  
25 to speak as positively as we wanted about generic drug pricing.

1 Well, a jury doesn't have to accept his inference, and  
2 at this stage, your Honor, cannot. This is not the stage in  
3 the litigation where you select the inference that is where you  
4 are at liberty to adopt an inference in favor of the movement  
5 opposing the non-movement where both inferences are reasonable.  
6 It's equally reasonable and I think far more reasonable for a  
7 jury to think that when somebody is asked a pointed question  
8 about the sustainability of pricing and they are told  
9 internally that there is minimal pricing opportunities, that  
10 they don't go out and lie about it. That they either tell the  
11 investors, We're not at liberty to answer that question at this  
12 time, or they say it looks like the pricing opportunities are  
13 minimal. That's the information he had. That's the  
14 information he hid from investors.

15 Exhibits 243, 244, 246, 295 are multiple additional  
16 reports that were sent to Brown and Papa in September and  
17 October 2015 warning of pricing deterioration in generic  
18 prescription drugs just as they had expected.

19 Now, the evidence overwhelmingly shows that Perrigo's  
20 conduct was illegal at times as well as super competitive.  
21 Again, it's not necessary for our claims to advance to a jury,  
22 but we think a jury will find that they were both  
23 unsustainable, super competitive and illegal.

24 There is both direct and circumstantial evidence. The  
25 direct evidence, Sandoz, and Sandoz is a company that embodies

1 two of Perrigo's competitors, Sandoz and a company called  
2 Fougera, which merged into Sandoz in approximately 2012.  
3 Sandoz admitted that it fixed prices, rigged bids and allocated  
4 markets with Perrigo. They didn't just say that about desonide  
5 cream, as counsel said. They said they did that -- they  
6 conducted those illegal practices on products including  
7 desonide. That's powerful evidence that wasn't present in any  
8 of the collusion cases that defendants cite. That will be  
9 presented by a live witness at trial but for the summary  
10 judgment record, it can be found at Exhibit 120, and, Tom, if  
11 you could, put up the thing on Sandoz.

12           It would be presented by live witness at trial but for  
13 the time being, we have a summary judgment record that has  
14 Sandoz's deferred prosecution agreement. That's Exhibit 120,  
15 an affidavit from Sandoz saying that their deferred prosecution  
16 agreement statements were accurate and that they would -- and  
17 that Perrigo was the company identified as company B and that  
18 they would present a witness at trial to testify to those  
19 facts. We also have a letter agreement with Sandoz's counsel  
20 saying they will present a witness at trial to testify to those  
21 facts. That's Exhibit 161.

22           The record also contains additional direct evidence from  
23 the admission of sales -- a sales executive for Sandoz and  
24 Fougera and another company called Aurobindo at other times,  
25 Tony Thomassy that said he had hundreds of improper

1 communications with Perrigo around and about price increases.  
2 That is Exhibit 116. And what Mr. Thomassy was referring to  
3 was confirming the evidence that is the findings of the state  
4 attorney's general that are documented in their complaint.

5 Let's speak a little bit about that complaint.

6 Perrigo itself injected the state attorney general  
7 complaint into the summary judgment record. It presented the  
8 complaint for the Court's consideration from its opening brief.  
9 We believe that this is proper and that the Court should  
10 consider the summary -- the state AG complaint at this  
11 juncture. At summary judgment, the question isn't whether a  
12 document itself is admissible. We don't foresee asking  
13 your Honor to admit this document at trial but rather to have  
14 people testify about the findings. At summary judgment, the  
15 proponent of evidence need only describe the form of evidence  
16 that, quote, is capable of being admissible at trial. That is  
17 the *Fraternal Order of Police* case at 842 F. 3. 231 from the  
18 Third Circuit.

19 We don't -- there is no need for your Honor to rule on  
20 the admissibility at this time but whether the Court, in fact,  
21 decides to admit it at trial should be made in consideration of  
22 the precise context for which the party seeks to address it at  
23 trial, but we think there is at least four ways that this can  
24 come in -- the factual parts of this can come in at least,  
25 number one, for impeachment.

1           You heard counsel talk extensively about their claims  
2     that the Department of Justice and regulators never went after  
3     Perrigo. Well, if they want to open the door and ask the jury  
4     to infer that Perrigo was somehow cleansed of its sins, that it  
5     was somehow exonerated by regulators, we are entitled to  
6     introduce evidence that is nowhere near the truth, that 48  
7     state attorney general and the attorney general of the District  
8     of Columbia and a couple places like Guam, et cetera, have  
9     brought -- where all the highest law enforcement officers in  
10    their respective jurisdictions, the fact that all of them have  
11    brought charges against Perrigo completely impeaches any idea  
12    that it has been exonerated for price fixing.

13           The second way it comes in, Federal Rule of Evidence  
14    703. That's because it is of the type of evidence that is  
15    normally considered and relied upon by experts in forming their  
16    opinions. Our generic drug expert, Todd Clark, relied on it.  
17    Defendants' damages expert, Paul Gompers, also cited a number  
18    of antitrust cases that -- and both complaints, unadjudicated  
19    complaints and investigations in his report, and defendants set  
20    that forth in their own statement of facts that they tell  
21    your Honor is the undisputed information upon which your Honor  
22    should consider summary judgment at paragraphs 365 to 382.  
23    Even the Third Circuit considers unadjudicated pending  
24    antitrust cases in considering the cases before it.

25           For example, in *Chocolate*, it is cited in expert report

1 extrapolating the facts from a still pending Canadian antitrust  
2 case. That's 801 F.3d. At page 402 to 404.

3 It is also true that this can come in under Federal Rule  
4 of Evidence 803, 8(A)3, which excludes from hearsay a record of  
5 a public office if it sets forth factual findings from a  
6 legally authorized investigation unless the opposing party  
7 demonstrates the findings lack trustworthiness.

8 The proponent need only establish the foundation for the  
9 record by showing that it does, in fact, set forth findings  
10 resulting from an investigation made pursuant to authority  
11 granted by law and as this district has said, once the  
12 foundation is established, the evidence will be admitted unless  
13 the opposing party shows that it is untrustworthy. That is  
14 *GAMMA VINS*, 334 F. Supp 2nd 662.

15 So what are the three components? Public office. No  
16 one disputes that the state AG complaint is from a public  
17 office. They are by definition public offices.

18 Was the investigation authorized? No one disputes that  
19 state attorney generals are authorized to look into price  
20 fixing in their respective states, and no one disputes that as  
21 part of the investigation here phone records and text records  
22 were provided to the state attorney general. They analyzed  
23 those records. They created a database allowing them to be  
24 cross referenced, and they publish findings in their complaint  
25 indicating how those calls were made and from whom they are

1 made, from whom they are received, what time to the second.  
2 Those are findings. Those are factual. Those are not saying  
3 we believe this constitutes X, Y or Z. They're saying, We  
4 conducted this investigation of the phone records and here is  
5 what we found.

6 Defendants offer no plausible alternative explanation  
7 that it can be anything other than findings from a public body  
8 filing an authorized investigation. In fact, it would make no  
9 sense that the state attorney general would be able to link up  
10 those calls had they not done the groundwork in their  
11 investigation, which brings us to the trustworthiness.

12 Defendants haven't made any showing that they were not  
13 trustworthy. The fact that virtually every state attorney  
14 general signed onto the complaint, including from this good  
15 state, is indicia of trustworthiness. And witnesses, such as  
16 Andrea Felix, consistently testified that they could not have  
17 dispute -- they could not dispute having made the  
18 communications identified to them in the state attorney general  
19 complaint.

20 Mr. Thomassy agreed that the allegations ascribed to him  
21 in the state attorney general complaint as CW6 were accurate.  
22 On dozens of occasions, Perrigo admitted that the  
23 communications set forth in the state attorney general  
24 complaint took place. That is documented in footnote 22 of our  
25 brief and in Exhibit 88, which is Perrigo's request to --

1 request -- Perrigo's response to request for admission.

2 Defendants cite a few cases suggesting that not every  
3 complaint from a government agency falls within that exception  
4 to Federal Rule of Evidence to the hearsay rule. That is a red  
5 herring because that is not at all what we argue; although,  
6 some courts have held that regulatory complaints presumptively  
7 fall under Federal Rule 803, such as *U.S. v. Gluck*, which we  
8 cite on page 52, that's not necessary to reach here. This case  
9 involves a limited context where a complaint that has been  
10 factually verified by repeated witnesses and by the company  
11 itself as to certain allegations that they deemed worthy of  
12 responding to sets forth the detailed determinations of an  
13 investigation from law enforcement, that those portions are  
14 capable of being admitted under 803(A)3.

15 Finally, your Honor, the fourth way that this could be  
16 introduced as evidence is through the defendants own  
17 admissions. As I mentioned, your Honor, defendants admitted in  
18 their responses to request for admission that hundreds of these  
19 phone calls identified to the second in the state AG's  
20 complaint actually took place.

21 So what do we have here in addition to the actual  
22 findings of the state AG, the actual direct evidence from  
23 Sandoz and Mr. Thomassy about fixing prices and rigging bids  
24 and allocating customers. We have a lot of circumstantial  
25 evidence as well indicating collusion.



1           The Third Circuit in *Valspar* made clear that where as  
2 here direct evidence is provided, no circumstantial evidence is  
3 required, but we also provide extensive circumstantial evidence  
4 showing that Perrigo, in fact, colluded with other drug  
5 manufacturers. That's on page 44 to 53 of our brief.

6           Our expert, Mr. Clark, who literally wrote the book on  
7 generic prescription drugs in the United States -- it's called  
8 The Generic Handbook, has opined that the evidence he reviewed  
9 shows hallmarks of collusion and is inconsistent with actual  
10 competition, even within an oligopoly. That is Exhibits 102,  
11 and 158 is his reply report.

12           Perrigo's internal documents show that it frequently  
13 declined to bid. A May 2014 contract form for Permethrin, for  
14 example, says, Per J.W. -- that's John Wesolowski -- we need to  
15 give up the product due to market share. A July 2014 email  
16 stated that Perrigo did not want to win customer account for  
17 desonide because we have taken enough business.

18           An October 2014 email telling a customer, from Perrigo  
19 to a customer, McKesson, said that Perrigo would not bid for  
20 that customer's business even after requested because it,  
21 quote, Would really upset our competitor, end quote. That is  
22 Exhibit 253.

23           Now, a reasonable jury can look at this, and it might  
24 accept the spin that's proffered by the defendants. I don't  
25 think that's the natural reading of these documents, but it

1 might also say that all of these times that Perrigo told --  
2 said internally, candidly, it wasn't going to bid or even told  
3 a customer that it could not risk upsetting its competitor, all  
4 of that is consistent with a tacit fair share agreement, which  
5 is exactly what the evidence shows here. Perrigo couldn't show  
6 legitimate reason.

7           And I know that counsel said repeatedly that there were  
8 margin issues, that there was, I think he said, an expensive  
9 factory in New York, but here is what he didn't tell your  
10 Honor. When they were pressed for details at the 30(b)(6)  
11 deposition, that is where it's binding, not where a counsel can  
12 get up and just testify as if he was a witness, but where a  
13 corporate representative needs to tell the truth and bind the  
14 company, the 30(b)(6) witness testified that Perrigo wasn't  
15 able to tell why it implemented any of its particular price  
16 hikes. That's Exhibit 170 at pages 166 to 167.

17           A reasonable jury could also consider circumstantial  
18 evidence of collusion, the magnitude of the price hikes, three,  
19 five, 700 percent. That is not something that a business owner  
20 would dream to do without a reason to believe that its  
21 competitors would go along and not undercut its pricing.

22           This is a very different case from those like *Chocolate*  
23 and *Flat Glass* and *Baby Foods* and *Valspar* in the Third Circuit  
24 that involve tiny price hikes. And in *Valspar*, the  
25 Third Circuit distinguished between the magnitude hikes. It

1 distinguished between abrupt and radical price rises, which is  
2 what we see here, and those that are just an uptick in  
3 preestablished industry practice.

4 I believe in *Valspar* they were dealing with roughly 16  
5 price hikes that in the aggregate dealt with -- boosted prices  
6 31 percent. We're talking about an overnight change that's ten  
7 times in magnitude. Even defendants don't dispute that a  
8 reasonable jury could view a 300, 500, 700 percent overnight  
9 price increase as abrupt or radical.

10 Jurors come in with a world of experience. They don't  
11 see -- they know that prices go up sometimes, but they don't  
12 see the price of a loaf of bread going from \$3 to \$21  
13 overnight. They don't see the price of a sedan they are  
14 looking at going from 20,000 to 140,000 overnight. Price hikes  
15 of this magnitude don't happen under normal circumstances and a  
16 reasonable jury is not required to pretend that they do.

17 Perrigo cites two cases in its reply brief. They  
18 mention briefly about the magnitude but neither holds that a  
19 radical and abrupt price hike can't be evidence of collusion.  
20 First in the *Blomkest Fertilizer* case, that involved a consent  
21 decree that required prices to be raised because the prior  
22 prices were dumping -- were deemed to be dumping prices in  
23 violation of the federal antidumping laws.

24 There is nothing like that here. There is no consent  
25 decree requiring Perrigo to raise it. It decided to raise it.

1 The *Erie County* is other case that they cited. That case  
2 involved bidding for road salt in Ohio, and it determined that  
3 the price increases there were mostly due to the State's  
4 bidding rules and unusual demand. The holding was limited to  
5 those unique facts.

6 It never adopted any rule that the magnitude of price  
7 hikes cannot be circumstantial evidence of collusion, and at  
8 any rate, it was an Ohio case and doesn't undercut the Third  
9 Circuit's discussion in *Valspar* about the magnitude having some  
10 bearing.

11 A reasonable jury could also consider the huge risk that  
12 Perrigo took of incurring massive penalties when it implemented  
13 price hikes. This is the opposite situation that the Third  
14 Circuit considered in *Valspar*, where the Third Circuit noted  
15 there was no or minimal risk under the contracts that *Valspar*  
16 had with -- that the defendants in that case had with their  
17 customers.

18 Here, if the price hikes didn't stick, Perrigo could  
19 lose tens of millions of dollars on a single drug that's  
20 described by our expert in Exhibit 158. It is admitted by  
21 defendants' expert, perhaps at least, as to the mechanism in  
22 Exhibit 100. It is discussed by Perrigo's former vice  
23 president of -- former CFO of the generic prescription drug  
24 unit, Mr. Gallagher, in his deposition which was Exhibit 172 at  
25 page 206.

1           A reasonable jury could conclude that Perrigo took this  
2 massive risk because it understood that it's competitors would  
3 go along. Now, if defendants feel that there is an innocuous  
4 version of why Perrigo would take this risk, they can argue  
5 that to the jury. The jury is entitled to consider the natural  
6 effect of Perrigo's actions.

7           Additionally, a jury can consider this wasn't a  
8 situation like in *Chocolate* or the Third Circuit noted that  
9 compressed margins would make it irrational for a competitor to  
10 undercut a price hike. Here it was the exact opposite. While  
11 Perrigo's experts did not get into the actual gross margins,  
12 our expert did.

13           Mr. Clark examined the gross margins for all the  
14 products that he detailed in his report. That's Exhibit 102.  
15 And he found that they were all very high margin products, as  
16 much as 96 percent, and that's before the price hike. So the  
17 price hike wasn't a situation where the gross margins had  
18 compressed because of the new factory or because of a supply  
19 shortage. By the way, a supply shortage is supposed to be  
20 reported to the FDA, and nobody has offered any evidence here  
21 that any supply shortage was provided to the FDA about any of  
22 the drugs we are talking about.

23           If there is no collusion, a competitor could easily  
24 undercut a price hike without facing any margin pressure here.  
25 The margins were already very high they could say, we are going

1 to drop from let's say, 90 percent to 80 percent and undercut  
2 Perrigo and take the entire market. That didn't happen here.

3 So the fact it didn't happen suggests -- is something  
4 that a reasonable jury could find probative, circumstantial  
5 evidence of collusion. A reasonable jury could also consider  
6 circumstantial evidence the fact that similar price hikes did  
7 not occur in similarly structured generic prescription drug  
8 markets.

9 Now, Mr. Wareham indicated to your Honor and on this  
10 limited point, I agree, that topical generic prescription drugs  
11 are more difficult to manufacture than, let's say, a pill. But  
12 there are other generic -- and as a result, it takes a little  
13 more testing. There are not quite as many competitors. But  
14 there are other generic prescription drug markets that are  
15 similar in structure. Our expert, Mr. Clark has identified two  
16 of them; Ophthalmics, the eye drugs and injectables.

17 Neither of those demonstrated the same kind of abrupt  
18 and massive price spikes as you found in markets in which  
19 Perrigo competed. Reasonable jury could also consider that  
20 many of the price hikes occurred right after industry meetings.  
21 I realize that defendants say that there is innocuous spin,  
22 that this might not have meant anything.

23 But a jury doesn't have to turn its eye to the fact  
24 that, for example, on February 22nd, 23rd in 2013, Papa and  
25 Brown both attended the annual -- GPhA meeting, I'm sorry, let

1 me spell that out. Capital G. Capital P. Lower case H.  
2 Capital A. G-P-h-A. That's in Exhibit 160.

3 Three days later, Perrigo's internal documents indicated  
4 it considered, quote, Pricing opportunities. There goes that  
5 word again, including hikes for permethrin, desonide,  
6 Halobetasol, Clindamycin and hydrocortisone valerate. Exhibit  
7 284.

8 A reasonable jury doesn't have to imagine that has to be  
9 a coincidence. They can infer based on the proximal, the  
10 temporal proximity. Perrigo's -- especially because Perrigo  
11 can't come up with any legitimate reason specifically why it  
12 hiked any of those drugs.

13 Finally, Perrigo's own documents indicate that it  
14 planned on losing very, very little market share despite  
15 massive price hikes. For example, Exhibit 269 identifies zero  
16 to two percent anticipated share losses for price hikes  
17 exceeding 100 percent. A reasonable jury could infer from this  
18 that Perrigo knew its so-called competitors would play ball.

19 Now, with respect to the pricing strategy, Perrigo's  
20 misrepresentations were equally misleading. Defendants don't  
21 dispute that, at an individual drug level, Perrigo's massive  
22 price spikes were not flat to slightly up. And a reasonable  
23 jury could, and we think will conclude, that spiking the drug  
24 by 300 to 700 percent in price is not flat and it is not  
25 slight.

1           Instead, defendants argue that if you construe sentences  
2 from this document with another sentence that's a couple lines  
3 earlier that if you spin it a particular way, you can erase the  
4 words that were actually said and construe it as only applying  
5 on a portfolio level. But that's not what the actual words  
6 that were used said.

7           The exact words that Papa used are cited in our brief.  
8 They are in the record at Exhibit 76 and he said that it didn't  
9 matter whether you are talking had about on a granular level  
10 about a specific product or specific category. The answer is  
11 the same. The exact words are, quote, Whether we're talking  
12 about any specific product or any specific category or any  
13 segment of our business, the overall comment is flat to  
14 slightly up for our pricing. A reasonable jury can take these  
15 words for their plain meaning.

16           We don't think Papa's inference is plausible. But that  
17 is a trial argument. It is not a summary judgment argument.  
18 At summary judgment, all inferences have to be drawn in the  
19 nonmovant's favor, all reasonable inferences. It is  
20 unquestionable that taking words for their plain meaning, the  
21 actual words that defendants use before adopting a strategy for  
22 litigation, that that is a reasonable inference.

23           That is for the jury to choose as the Third Circuit made  
24 clear in *Nathanson* and *Marino*. With respect to the competitive  
25 environment, for example, Mr. Papa said on May 12, 2015 -- it



1 is in Exhibit 124 -- the generic prescription drugs operated in  
2 what he called, quote, obviously a competitor environment. And  
3 other times defendants described it as heavily competitive.  
4 But a reasonable jury could find that massive parallel price  
5 hikes by so-called competitors are the exact opposite of heavy  
6 competition.

7           They could find that declining to bid because you did  
8 not want to upset a competitor is the exact opposite of heavy  
9 competition and Perrigo argues that should get a free pass,  
10 because it was competitive on certain other drugs. That's like  
11 a basketball team saying we only shave points on a couple  
12 games, so, you know, what was the big deal?

13           Most importantly here, Perrigo's statements to investors  
14 did not say that only some of its generics operated in  
15 competitive environment and others did not. It made that  
16 comment generally. It made a sweeping comment. It did not  
17 qualify it in any way. Again, a reasonable jury can properly  
18 take Perrigo's words for their plain meaning. If defendants  
19 want to argue an alternate inference, they are free to do so,  
20 but undermining precedent, that is a jury issue.

21           The scienter for the generic prescription drug  
22 misstatements is also well-supported by record evidence.  
23 Besides the plain inferences from Sandoz's confession that it  
24 rigged bids and fixed prices with Perrigo, they are at least  
25 five additional reasons why a reasonable jury could find that

1 Perrigo and Papa and Brown were, at least reckless, if not  
2 intentionally misleading, in their false statements to  
3 investors.

4 First, Papa and Brown held themselves out to investors  
5 and analysts as being knowledgeable about generic prescription  
6 drug pricing, the pricing strategy, and the competitive  
7 environment. As Judge Arleo noted in her motion to dismiss  
8 opinion, she found that supported an inference of scienter.  
9 She said they repeatedly responded to pointed analyst questions  
10 regarding prices in the generic prescription drug division and,  
11 quote, in their answers, indicated personal knowledge.

12 She also said -- explained, in the context of specific  
13 inquiries, defendants' omissions of actual circumstances that  
14 were contrary to their answers presents an obvious risk of  
15 misleading investors. We believe it will be equally obvious to  
16 the jurors who will be charged with determining this at trial.  
17 But that was at the pleadings stage. Record evidence has borne  
18 out those allegations.

19 For example, on August 5, 2015, as shown in Exhibit 241,  
20 Papa claimed to investors that he knew whether pricing was  
21 sustainable and how the Perrigo's team was doing on pricing  
22 decisions. I think they put up a small portion of that in one  
23 of their slides where Papa said that the success was due to  
24 Perrigo's team doing good on pricing decisions -- or making  
25 good pricing decisions.

1           If Papa claims to know both the sustainability of  
2 pricing -- of the pricing windfalls and the cause for those  
3 pricing windfalls, he is holding himself out to investors as  
4 being knowledgeable. Now, either he was or he wasn't. Either  
5 he actually investigated these topics and knew the truth when  
6 he spoke falsely to investors, or is reckless in claiming to  
7 have that knowledge without investigation.

8           We also see this on October 22, 2015, with Ms. Brown,  
9 where she claimed to know whether or not Perrigo was insulated  
10 from pricing pressures. That's Exhibit 76. And counsel says  
11 that that relates to Martin Shkreli, and it may. It may. But  
12 it was because Mr. Shkreli raised, as counsel admitted, the  
13 price of it's drugs by a massive amount. Well, that is the  
14 exact same practice that Perrigo was doing.

15           That is the exact same practice that was causing an  
16 unsustainable drama that she said that Perrigo was insulated  
17 from. So either she investigated this at that time that she  
18 made that statement or she had not. But shes should not have  
19 held herself out as having knowledge of insulation if she  
20 didn't.

21           The second reason that -- additional reason why a  
22 reasonable jury could find that defendants had scienter in  
23 their generic drug statements is that, the record shows that  
24 Papa and Brown were regularly briefed about generic  
25 prescription drug pricing. In late 2014, both were advised

1 about how the economics of the large price increases worked,  
2 that they would be some penalties, and it would be unprofitable  
3 if the competitive environment didn't cause the price increase  
4 to stick. If someone had to roll that back, they would be  
5 stuck with the penalties and they wouldn't get the benefit of  
6 the price increase.

7           They knew that well before the class period that was  
8 described in Exhibit 278, a presentation that the email  
9 attachment says -- or the transmittal email expressly says was  
10 sent to Joe and Judy; that is Joe Papa and Judy Brown.

11           November 12, 2014. Even before the class period, a  
12 customer sent Papa a letter regarding a six-fold increase in  
13 desonide. That is Exhibit 272.

14           So these were not unknown to the defendants. These were  
15 well known to the defendants. They just chose not to speak  
16 honestly about them. And as we already discussed, the pricing  
17 review that Papa and Brown conducted on April 13, 15, 2015,  
18 warned that generic prescription drug pricing would cease to be  
19 a tailwind by the third quarter of 2015, and would become a  
20 headwind soon after that. That is Exhibit 183 and 242.

21           Papa and Brown were sent reports in July 2015, that's  
22 Exhibit 245. September 2015, Exhibit 241. October 2015,  
23 exhibits 243, 244 246, 295, all showing that pricing was  
24 unsustainable and that pricing opportunities were evaporating.  
25 Pap and Brown also both personally reviewed and approved the

1 scripted comments that Brown presented regarding being  
2 insulated.

3 That review is documented in Exhibit 276, which is the  
4 transmittal of a draft of that statement to defendant Papa.  
5 Judge Arleo stated that she believed that statement to be  
6 palpably reckless, and defendants can't explain why a  
7 reasonable jury couldn't reach the same inference.

8 Just after giving these warnings, Papa published to  
9 investors guidance claiming that the facts known to him -- he  
10 said this as part of his guidance -- the facts known to him  
11 indicated that the competitive environment would remain  
12 unchanged. That is Exhibit 69. In truth, he was told the  
13 exact opposite. From the beginning of the class period and  
14 worsening through the summer and early fall of 2015, he was  
15 repeatedly warned that the competitive environment was changing  
16 and for the worse. More competition.

17 The third element that defendants could -- I'm sorry,  
18 that a reasonable jury could consider when contemplating  
19 defendants -- the circumstantial evidence the defendants'  
20 recklessness, at least scienter with respect to the generic  
21 drug statements, is record evidence showing that Papa and Brown  
22 were actually involved -- albeit at a high level -- in generic  
23 prescription drug pricing decisions.

24 Doug Boothe -- the head of Perrigo's generic  
25 prescription drug division -- testified that because of the

1 risk of upfront penalties that might not be recouped, the price  
2 hike decision sometimes required input, quote, from the CFO or  
3 the CEO. That's Papa and Brown.

4 John Wesolowski also testified that the normal part of  
5 approving a price hike was that Mr. Boothe -- here is the exact  
6 words he said -- quote, would normally take that to Judy Brown  
7 and then it would cascade back. That was Exhibit 171. Her  
8 claims to not have been informed need not be credited by a  
9 reasonable jury. They are directly contrary to the evidence.  
10 And Perrigo's 30(b)(6) witness also admitted that price  
11 increases very well could have been raised with Perrigo's  
12 executive committee, which included both Papa and Brown.

13 As Perrigo -- as Brown admitted at deposition, the  
14 competition on key products and pricing pressure for Perrigo's  
15 generic drugs was an issue that she and Perrigo's management  
16 team kept, quote, front and center. That is Exhibit 166.  
17 That's her words.

18 The fourth thing that a reasonable jury could consider  
19 is the -- in the scienter is the magnitude of the price hikes,  
20 that they would not go unnoticed in an organization. Price  
21 hikes of hundred percent to 800 percent or more, they are huge  
22 in magnitude. It is a stark contrast to the price hikes of one  
23 to two percent that Perrigo said it aimed for in other parts of  
24 its business.

25 A reasonable jury could conclude that if Papa or Brown

1 decided not to inquire about why Perrigo was able to achieve  
2 such enormous price hikes is because they didn't want to know  
3 the details so they could maintain plausible deniability.  
4 After all, if they did not think that there was anything wrong  
5 with the way that they went about these price hikes, they  
6 would, of course, want to study these price hikes and try to  
7 implement them in other parts of their business.

8 All businesses want to have a better margin structure if  
9 they can improve their pricing. That's just a windfall to the  
10 bottom line. Any reasonable manager would want to know that if  
11 there wasn't a reason to not know it, and that reason, of  
12 course, is plausible deniability. It is just a matter of  
13 common sense. A jury is not required to dismiss common sense  
14 when they go -- when they enter the jury room.

15 Additionally, Papa and Brown each attended industry  
16 events during the time that Sandoz described its price fixing  
17 with Perrigo. The GPhA meeting -- capital G, capital P, lower  
18 H, capital A -- described in Exhibit 160, three days later,  
19 Perrigo hiked prices on desonide and, of course, when you go to  
20 the deferred prosecution agreement with Sandoz, Sandoz says, We  
21 fixed prices with Perrigo about desonide, including desonide.  
22 We rigged bids and allocated markets on drugs including  
23 desonide.

24 Defendants cite some cases where meeting attendance was  
25 found not to be convincing, and none of those cases involve a

1 competitor where -- that admitted having engaged in price  
2 fixing and market rigging at the time of the meetings.

3 Defendants also argue that there were dozens of meetings  
4 so any price hike would be close to a meeting. That is a  
5 strained inference that a jury is not bound to accept. A  
6 reasonable jury could also see this the opposite way. If  
7 so-called competitors were actually competing, why would they  
8 need to meet dozens of times at industry meetings? This is an  
9 additional piece of the scienter puzzle.

10 Each of these items on its own is sufficient to get to a  
11 jury, but together they easily allow a jury -- they provide  
12 very strong evidence of scienter easily allowing a jury to find  
13 a reasonable inference that Papa and Brown and Perrigo were at  
14 least reckless in their statements to investors.

15 Finally, I would like to make two additional points, and  
16 then I know we've gone later than anyone expected, and I will  
17 be very brief.

18 Tom, if you could, put up the scope slide.

19 Number 1, there's been a lot of statements that were  
20 made from the other side about claims that this action was  
21 somehow gutted and made into a very tiny action. In fact, our  
22 main two categories -- we brought four categories of  
23 misrepresentations in the amended complaint, the two most  
24 significant were upheld virtually in their entirety. This  
25 was -- we don't need to guess about what a particular word in a



1 footnote of the opinion might mean. We have an order.

2           None of the orders say they were dismissed and the  
3 orders in this case say the exact opposite for class notice,  
4 which went out to tens -- to about 100,000 potential class  
5 members. It was agreed to by everyone at this table, and  
6 everyone at this table and Judge Arleo also agreed that it  
7 accurately and concisely described the claims -- clearly and  
8 concisely states the nature of the claims in this action. That  
9 is ECF 292.

10           The notice that she made that about said that this  
11 lawsuit involves both performance and integration of Omega,  
12 misrepresentations involving the performance and integration of  
13 Omega, and with respect to generic drugs, that Perrigo's  
14 pricing strategy, noncompetitive practices, and the competitive  
15 environment for Perrigo's generic prescription drug unit. It  
16 doesn't say anything about being limited to only six drugs. It  
17 doesn't say anything about being limited to only noncompetitive  
18 practices that can also be charged under the Sherman Act. It  
19 says nothing of the sort.

20           Secondly, there has been -- the second brief point I  
21 would like to make is that defendants went on and on about what  
22 they claim to be a lack of motive. It is true that we do not  
23 have all of the underlying documents that we now have that tell  
24 the truth about Perrigo's motive in the -- during the time of  
25 this fighting in the Mylan acquisition. We don't have all of

1 the documents describing how Papa and Judy Brown spent days and  
2 days and days and days, a huge amount of their time meeting  
3 with investors trying to persuade them to ditch the  
4 Mylan tender offer as described in our papers.

5           We didn't have the evidence that Papa and Brown  
6 themselves sold their own shares for lower than the Mylan  
7 tender offer, undermining their statements to investors that  
8 that offer was too low, but, most importantly, we don't have  
9 the Omega executive committee minutes. Remember, Omega is part  
10 of Perrigo at this point. Perrigo's president, John  
11 Hendrickson, said at this meeting, signed on to these minutes,  
12 that these minutes concede that, quote, Perrigo -- this is an  
13 actual quote, your Honor -- Perrigo overpromised because of  
14 Mylan's situation, end quote, Exhibit 236. That's why we're  
15 here.

16           Perrigo chose not to tell the truth because it had a  
17 distinct problem fighting the Mylan tender offer and investors  
18 bore the brunt of that dishonesty. That is the nature of our  
19 case. That is the claims we intend to present at trial and a  
20 reasonable jury can decide whether our inference is the  
21 inference to draw or defendants' inference is the inference to  
22 draw from the record documents. But there is far more than a  
23 mere scintilla of evidence and any suggestion to the contrary  
24 is simply wrong.

25           At this point, I would be happy to answer any questions

1 your Honor may have or I will turn it over to Mr. Harrod to  
2 address loss causation.

3 THE COURT: No questions at this point, Counsel.  
4 Thank you.

5 MR. SILVERMAN: Thank you.

6 MR. HARROD: Good afternoon, your Honor, James Harrod  
7 for the plaintiffs.

8 I'm going to start -- I planned to start with a  
9 different subject, but I'm going to start and mirror my  
10 argument with what Mr. Wareham started with, and that's on our  
11 14(e) claim. It is a Williams Act claim related to the tender  
12 offer and the alleged false statements that the defendants made  
13 in defense of that tender offer.

14 As Mr. Silverman just talked about, Perrigo and its  
15 executives, the defendants here, really did not want the tender  
16 offer to be successful and they fought it, and here our claim  
17 alleges violations of section 14(e) of the Securities Exchange  
18 Act in connection with that tender offer.

19 These claims seek to compensate Perrigo's investors. As  
20 a result of the misstatements that were made by the defendants,  
21 the shareholders of Perrigo were deprived of the opportunity to  
22 participate on a fair basis in that tender offer that Mylan  
23 made. These misrepresentations caused Mylan's tender offer to  
24 fail.

25 Our damage and loss causation analysis tracks that

1 outcome and the purpose of the statute, which provides a  
2 conservative -- and our damages assessment here provides a very  
3 conservative measure of those damages.

4 Defendants argue that there are no damages on the 14(e)  
5 claim. We completely disagree, and the damages under 14(e) are  
6 purposely designed to effectuate the remedial purpose of this  
7 statute. This statute is designed to ensure that  
8 misrepresentations are not made in connection with tender  
9 offers. It's designed to provide those damaged investors with  
10 compensation for what they would have received in the absence  
11 of defendants' statements interfering with the acceptance of  
12 the tender offer.

13 Judge Arleo held in the motion to dismiss whether the  
14 shareholder had a fair opportunity to make that decision, the  
15 decision to tender or not, based on the information, the  
16 disclosures available is the critical question.

17 The *Rudinger* case that Perrigo cited also supports the  
18 conclusion that if a defendant is liable for a violation, they  
19 bear the risk on the damages flowing from that liability.  
20 Specifically in denying the summary judgment, the *Rudinger*  
21 Court said, Once a plaintiff establishes damage from a lost  
22 opportunity, the defendant must bear the risk of its uncertain  
23 amount. Otherwise, the securities laws could be violated with  
24 impunity in any situation in which the violation does not cause  
25 out-of-pocket loss.

1           Mr. Wareham talked about speculation and the damages  
2 here being speculative and the loss causation being  
3 speculative. They are not, and that's not just because they  
4 didn't cause an out-of-pocket loss but because we have a very  
5 concrete methodology for establishing both the loss causation  
6 and the damages here. We cite the *Rudinger* case that I just  
7 quoted from at 87 of our opposition brief.

8           Okay. So I'm just going to go through the facts related  
9 to the Mylan tender offer briefly. I think it is important to  
10 understand them in the context of understanding how the  
11 defendants' misrepresentations caused the loss or the injury  
12 that the shareholders suffered.

13           Mylan launched a tender offer for Perrigo that was  
14 ultimately valued at \$174.36 per share. That tender offer  
15 value is based on the exchange of 2.3 Mylan shares plus \$75 for  
16 one share of Perrigo. So if the tender offer had succeeded on  
17 November 13, 2015, the shareholders of Perrigo tendered their  
18 shares would have received compensation equivalent to \$174 and  
19 change. The tender offer expired on November 13, 2015. The  
20 one condition to completion of the tender offer and the receipt  
21 of that compensation by Perrigo shareholders was that  
22 50 percent of the Perrigo shareholders agreed to tender their  
23 shares. So they are saying we will give you our Perrigo  
24 shares. You will give us, as of that date, something that  
25 would have been valued at \$174.

1           This is where Perrigo's defense of this came in. They  
2 needed to ensure that less than 50 percent of the shares be  
3 tendered and in doing so, that would cause the tender offer to  
4 fail. They were successful in doing that. Forty percent of  
5 Perrigo's shareholders tendered their shares.

6           In the measure of damages that we propose as a result of  
7 the tender offer failing to be consummated is the difference  
8 between what they would have received on November 13th and the  
9 price the Perrigo shares traded at immediately after the tender  
10 offer failed, and so that difference is 100 -- the tender offer  
11 compensation is \$174. On November 13, 2015, on the day the  
12 tender offer failed, Perrigo shares traded at \$140.53 at the  
13 opening. There is a difference of \$33.82 per share.

14           So what we're saying is if you had tendered your shares,  
15 if the defendants had not insinuated themselves improperly by  
16 lying to you about the conditions of their company, you would  
17 have immediately got a benefit of \$33.82 per share. I want to  
18 highlight, and our expert report goes through this in some  
19 detail, but that is a very conservative measure of damages.  
20 The spread between or the premium that the tender offer  
21 provided was higher at different points in time. We chose this  
22 because, A, it is not speculative. You can look at the  
23 numbers. They are concrete and they are objective, and you can  
24 conclude. You can do the arithmetic. Anybody can do this  
25 arithmetic.

1           So what I want to talk about next is that the defendants  
2 have come up with a counterfactual scenario. They are saying  
3 that the tender offer would have never gone through had Mylan  
4 known the true facts.

5           We have evidence that we can present by our expert and  
6 in the record showing that we believe the tender offer would  
7 have gone through. Our expert, Dr. Nye, opines as much. He  
8 looked at the fact that 40 percent of the shares tendered and  
9 he then concluded that there are a number of lawsuits,  
10 including the one that we're here today, and there is a number  
11 of individual lawsuits. Those people are making the same claim  
12 that these shareholders in this class action are making, that  
13 they were deprived of the opportunity to participate in the  
14 tender offer because of the misrepresentations in violation of  
15 section 14(e). If you add up the number of shares that are  
16 represented by those lawsuits, it eclipses 50 percent. So  
17 those people are saying we would have tendered. We couldn't  
18 tender, and we were deprived of the benefit of this. So you  
19 would get the 50 percent.

20           In addition to that fairly objective quantification of  
21 the fact that we would have eclipsed the 50 percent sharehold,  
22 Dr. Nye looks at the facts and the pricing of the two company  
23 shares and concludes it would have been economically rational  
24 for you to tender your shares because you would have achieved  
25 an immediate economic benefit. In fact, as we talked about,

1 both Mr. Brodsky and Mr. Silverman talked about the fact that  
2 Mr. Papa had agreed to sell his shares at \$150 per share. So  
3 he believed, certainly, that 150 was a fair value for his  
4 shares. He could have gotten more than that and other  
5 shareholders could have gotten more than that in connection  
6 with the tender offer.

7 Our other expert, Mr. Purcell, an investment banker,  
8 opines in that the absence misrepresentations, the tender offer  
9 would have also succeeded.

10 So there were no -- and there were no impediments to the  
11 tender offer succeeding. Mylan, very interestingly, despite  
12 what we have heard earlier today, Mylan agreed to engage in  
13 this binding tender offer without conducting any due diligence.  
14 It agreed to, basically, buy these shares of Perrigo without  
15 getting any nonpublic information, very common in these kinds  
16 of corporate transactions for people to have nondisclosure  
17 agreements, to be provided with many, many reams and rooms full  
18 of data that they could pour over that's nonpublic to  
19 understand exactly what it is that they are choosing to buy.

20 It's important that Mylan chose not to do that here, and  
21 they didn't.

22 So if we look at that evidence and we conclude that  
23 there were economic reasons why the tender offer should have  
24 succeed, and if the tender offer had succeeded, these  
25 shareholders would have achieved that \$33.86 benefit.



1 Defendants disagree with this. And their primary  
2 disagreement with it is based on what I will kindly refer to as  
3 a hypothetical. And the hypothetical presumes, like I said  
4 before, that if Mylan had told the truth -- or if, sorry. If  
5 defendants had told the truth, Mylan would have never launched  
6 the tender offer. But their hypothetical assumes they don't  
7 violate the statutes.

8 And so what we say is, if you violate the statute and we  
9 have a finding of liability, you are now responsible for the  
10 damages that ensue from that liability.

11 Their assumption is, I think, circular. It also  
12 conflates the questions of liability and causation, which is  
13 improper. And it basically would allow any defendant in this  
14 situation to get out of any guilt on a Williams Act claim by  
15 just saying, Well, you can't unscramble this egg, you can't  
16 know that the purchaser would have preceded with the  
17 transaction.

18 Their basis for this hypothetical is entirely  
19 hypothetical. There is no testimony in the record from anyone,  
20 from anyone at Perrigo, from anyone at Mylan, from anyone at  
21 any other place suggesting that if the things that we say were  
22 misrepresented were told to Mylan, that they wouldn't have done  
23 the tender offer. It is pure speculation. It is entered by  
24 their expert, Dr. Subraminian. And interestingly, his  
25 statement, his conclusion that Mylan would not have conducted

1 the tender offer as they did is, in fact, speculation about  
2 Mylan's state of mind which they criticize our expert,  
3 Dr. Purcell -- or Mr. Purcell, that he should be excluded  
4 because he wants to testify, which he doesn't, about the state  
5 of mind of certain of the defendants.

6 So if Purcell can't testify about the state of mind of  
7 the defendants, Dr. Subramanian certainly can't testify without  
8 any record support as to what Mylan would or would have not  
9 done.

10 The other thing that I want to point out is the idea  
11 that Mylan would have been impeded by certain of this  
12 information is contradictory to what the defendants said when  
13 they were defending themselves against the tender offer.

14 One of Perrigo's defenses, and I will just quote one  
15 thing, is a release on November 10, 2015, Mylan had chosen to  
16 hide the ball. And it had resorted to half truths and empty  
17 promises, and scare tactics. We cite that at paragraph 36 of  
18 our statement of facts.

19 Perrigo had repeatedly and earlier cited Mylan's ethical  
20 challenges and difficulty with basically operating above board  
21 throughout the process. So the idea that they would now say  
22 that this company would be completely put off by the minor  
23 things that they say they are doing, which they don't admit  
24 that they were doing, doesn't really make any sense or hold  
25 together.

1           What they are really saying is, if there is no  
2     liability, there can be no loss causation. And we agree,  
3     except for the fact that we think there is liability on this  
4     claim, and therefore, we have presented a measure of damages  
5     that are, certainly, appropriate.

6           And the fact -- the fact of whether or not the tender  
7     offer would have been completed is a question for the trier of  
8     fact. Just like all of the other things that Mr. Silverman  
9     talked about. We cite in our opposition, the *Daimler Chrysler*  
10    AG case from the district of Delaware, 2003, which holds that.

11          Defendants, the last thing I'm going to cover on this is  
12    the idea that our expert, Dr. Nye, said that -- or the  
13    contention that he said that Mylan would have never done the  
14    tender offer if they had known the truth. That's not what he  
15    said. And he said he would not know what Mylan would have  
16    done, and he said he didn't have any understanding of that.

17          But also, based on defendants' contention regarding  
18    expert's testifies regarding the state of mind of other people,  
19    whether or not Dr. Nye -- notwithstanding our disagreement with  
20    their characterization of his testimony, even if that were his  
21    testimony, they say you are not allowed to testify about the  
22    state of mine of somebody else. And so what the value of that  
23    other than a nice gotcha point in an argument and in a brief,  
24    I'm not sure, but we don't think it has any value.

25          I'm going to move on to the 10(b), the open market

1 claims. In that context, I want to talk generally about loss  
2 causation and what's required for loss causation on those  
3 claims.

4 I want to first say that it's important really to  
5 consider what's actually required here. In loss causation is  
6 the measurement or the process by which information that was  
7 previously misrepresented or omitted comes to be known by the  
8 market. And that can come in one of many forms. What this  
9 *Semerenko* case from this Third Circuit says, it just requires a  
10 showing that the alleged misrepresentations were a substantial  
11 cause of the inflation and in the securities subsequent  
12 declined value.

13 So there has to be a substantial relationship between  
14 the misrepresentations and the news that causes the stocks to  
15 decline in value. Importantly, this affects some of  
16 defendants' arguments, because we hear about this repeatedly in  
17 their briefs. There is no requirement that a corrected  
18 disclosure be a mirror image of the prior misrepresentations.  
19 If you said -- just to give a very basic example -- the car was  
20 black and it turned out the car had rust on it, could be a  
21 corrective disclosure of that potential statement. It doesn't  
22 have to be the car was white.

23 That kind of mirror image disclosure is not what's  
24 required under the Securities laws. In the *Merck* case from  
25 this district from 2011 says that -- supports the idea that no

1 mirror-image requirements are embedded in the juris prudence on  
2 loss causation.

3 Defendants, you know, seek to apply a very different  
4 standard, a standard where everything is objective and there is  
5 no room for interpretation of facts at summary judgment.  
6 That's improper.

7 They say in their reply brief at page 27, oddly on their  
8 motion for summary judgment, that Plaintiffs have the burden of  
9 proving loss causation but that we have failed to do so. It  
10 may be true, and in fact, I think it is true that we would have  
11 the burden at trial. But they have the burden now of showing  
12 that there are no issues of material fact related to loss  
13 causation. And there are.

14 We have detailed evidence from the record. We have  
15 Dr. Nye's very detailed reports supporting contentions of loss  
16 causation and damages. And specifically for each -- we have  
17 seven corrective disclosure dates in the case, your Honor.  
18 Those are dates in which news released a cause Perrigo share  
19 price to decline materially.

20 On each of those dates, based on economic studies that  
21 Dr. Nye has conducted, we show that there is a statistically  
22 significant decline on those dates. After controlling for the  
23 market and the peers of Perrigo, meaning that, this is a  
24 statistical measure of the movement in Perrigo stock that  
25 controls for other market and industry factors. So it is just

1 the news affecting Perrigo. The defendants do not contest  
2 this. In fact, their expert, Dr. Gompers did not conduct an  
3 event study to determine whether or not any of our experts'  
4 statistics were wrong. They concede that they are correct.

5 And since we have provided that information, we have the  
6 evidence to prove loss causation. We have the evidence to  
7 prove damages. And so in this scenario there's no way that  
8 summary judgment can be granted on loss causation.

9 They, again, cite the *McCabe* case in their reply at 27,  
10 and in that case, the difference is that the plaintiffs did not  
11 cite any -- they did not make any allegations regarding loss  
12 causation. They didn't say that news came out that corrected a  
13 prior misstatement and that's what caused the price of their  
14 securities to decline. This case is totally different.

15 Here we have the seven corrective disclosures we're  
16 talking about. And one thing that I really want to emphasize,  
17 because a lot of what we heard earlier today was that the  
18 defendants really didn't misrepresent anything. They were  
19 really telling the truth.

20 Well, the thing is, is that the stock price reactions to  
21 the information that we set forth in our complaint and in our  
22 papers in support of -- opposition of summary judgment and  
23 certainly in Dr. Nye's reports reflect something very  
24 different.

25 On the disclosures at issue here, we have a 9.9 percent

1 decline, a 17 percent decline, another 9 percent decline. So  
2 what that reflects in general is that the market and  
3 investors -- very smart people who studied these companies in  
4 great detail -- saw the news that Perrigo released and said,  
5 Huh, I'm going to have to reduce the value of your firm by 17  
6 percent today. That's controlling for the market. That's just  
7 the Perrigo-specific drop.

8           That doesn't happen unless something in that news  
9 release shocked people. Made them think, something that I  
10 didn't know came out today, and that's because the defendants  
11 didn't tell them the truth. So that's why we see a 17  
12 percent drop on the April 25, 2016, disclosure.

13           I'm going to go through a couple of examples to sort of  
14 talk about some of the things that Mr. Wareham talked about.  
15 I'm not going to talk about each one of the seven disclosures,  
16 unless your Honor would like me to. I think it's highly  
17 unlikely that you would want that.

18           But I will do some and I think they will be illustrative  
19 of the others dates.

20           THE COURT: You predicted correct.

21           MR. HARROD: Okay. So I will start with the first  
22 collective disclosure state in the case. That was February  
23 18th of 2016. And on that date, Perrigo disclosed its fourth  
24 quarter fiscal year 2015 financial results. Those results were  
25 significantly below investors and analysts expectations.

1 Specifically, they were poor earnings in the announcement of an  
2 impairment of the value of the Omega assets. Mr. Silverman  
3 talked about that.

4 This was the first of several impairment charges,  
5 meaning that the value of that asset that they had bought,  
6 which was the biggest acquisition that had ever made, was going  
7 to be worth less than they expected. So it's an indication  
8 that that transaction is not panning out in the way that they  
9 expected, and that the value that the shareholders of Perrigo  
10 put into the acquisition of Omega is now worthless. That's  
11 what that signals.

12 So there were comments related to that by Perrigo and by  
13 the CEO, Mr. Papa, expressly linking the poor earnings in the  
14 impairment of Omega assets to issues with the integration and  
15 operation of Omega. Perrigo stock fell by 10 percent. That's  
16 after isolating the market and peer factors. That's a very  
17 large decline.

18 This was a partial disclosure of the problems at Omega.  
19 Dr. Nye, and if you look at his reports, there is excruciating  
20 painstaking detail in them. He looks at news, analyst reports,  
21 he compares them. He weighs the relationship between the prior  
22 misrepresentations and the news that's coming out and does a  
23 detailed analysis of that. I will spare you reading through  
24 that. But if you were to look at it, I'm sure that you would  
25 see the amount of detail and thought that went into that.



1           So he looked at analyst commentary on the February 18th  
2 disclosure. And he determined that there wasn't any other news  
3 that day that affected the stock. This goes to the point, and  
4 I will get to this more, about confounding information. And I  
5 think Mr. Wareham might have referred to it as a phobia  
6 disaggregation. That means that if there is multiple pieces of  
7 information affecting the stock on a certain day, Dr. Nye  
8 concludes that he doesn't need to parse that out. Meaning that  
9 if there is some pieces of information that are negative, that  
10 area about one aspect of the business that's unrelated to the  
11 fraud, he has to remove the effect of that.

12           He says he can do that, and he can do it. He just says  
13 for these disclosures, not that he is afraid to do it, but that  
14 he doesn't need to, because the information affecting, causing  
15 the decline on these dates is all about things that are at  
16 issue in this case.

17           Defendants disagree with that, and that's fine. They  
18 can tell that story to the jury. But they can't get summary  
19 judgment on it.

20           So Perrigo argues specifically to this case that the  
21 narrow interpretation of the case related to integration of  
22 Omega is not implicated by those disclosures. We have detailed  
23 statements in the record why that's wrong. We disagree with  
24 it. There is no need to disaggregate it. We believe we have  
25 more than readily established loss causation on February 18th.

1 I will do a couple more dates.

2 The next corrective disclosure is another one that Mr.  
3 Wareham talked about. This is news that comes out after the  
4 close of the financial market on April 21st. It is information  
5 indicating that Mr. Papa's going to leave the company, he is  
6 going to go take on a job at Valeant.

7 And our interpretation of this information is that the  
8 disclosure was -- was indicated to investors of further  
9 worsening conditions at Omega, and that Mr. Papa was leaving  
10 because his project of making this European acquisition was not  
11 going well. Again, defendants do not contest the statistical  
12 analysis on this date. They agree that it's statistically  
13 significant and that the company stock went down by 5.8  
14 percent.

15 They argue it is not a corrective disclosure because  
16 Papa's resignation was not the subject of any of the alleged  
17 misrepresentations. Again, I will turn you back to what I said  
18 earlier. There is no mirror image requirement. Information  
19 about complex multinational companies that have multiple lines  
20 of business with CEO's moving around and tender offers that are  
21 being launched and failing, the information is dynamic. It  
22 doesn't mean one thing. They look at this and they are saying  
23 we have report that Mr. Papa is leaving.

24 They look at that and say well, Mr. Papa is closely  
25 associated with the purchase of Omega. In fact, he was the

1 executive at Perrigo that was, by far, most closely associated  
2 with it. In the prior earnings release that I talked about, he  
3 was the one who said I will stick around and basically I'm  
4 going to right the ship at Omega.

5           So about two months later he's like I'm leaving, I'm  
6 out, I will take over Valeant and see what they can do. So  
7 unsurprisingly, the investors are like, that doesn't seem too  
8 good. That seems like maybe if he said he was going to stick  
9 around and fix it, he should stick around and fix it. He  
10 didn't; he left. The stock dropped.

11           Analysts covering the company looked at this and said,  
12 the mere thought -- this is just one quote -- that he would  
13 consider a new role could lead one to conclude that Perrigo is  
14 far from being fixed and that Papa may see moderating growth  
15 prospects at Perrigo. So he had hitched his wagon to the idea  
16 that Omega would achieve growth. That obviously wasn't  
17 happening, he left. The market interpreted that correctly,  
18 frankly, and he ended up leaving.

19           The defendants on this date make a specific argument  
20 about confounding information. They say that the reason why  
21 the stock dropped, at least in part was, because of concerns  
22 regarding the new CEO, Mr. Hendrickson -- who was the  
23 president -- was going to replace him and he's might not be as  
24 good as Papa.

25           Dr. Nye analyzed this and said well, the two issues of

1 Mr. Papa's leadership and what they represented to investors  
2 and the role of his successor, and the qualifications of his  
3 successor are inextricably intertwined. Those two things are  
4 related in such a way that can't be disentangled. He said, not  
5 that he couldn't disaggregate the effect of that confounding  
6 information, but that it wasn't necessary.

7 I am going to talk about a disclosure that just happens  
8 three days later on April 25, 2016. I want to focus in  
9 particular here on the defendants' arguments about confounding  
10 information, because this is a really critical disclosure date,  
11 in terms of what the types of arguments they are presenting on  
12 this subject are.

13 On April 25th, Perrigo announced preliminary results for  
14 the first quarter of 2016. They were substantially below  
15 investors expectations and they reduced -- the company also at  
16 that time reduced its earning's guidance for the rest of 2016.  
17 Perrigo explained that the poor results and reduced guidance  
18 were caused by bad generic Rx pricing reductions, poor BCH  
19 performance -- which is Brand and Consumer Healthcare, that's  
20 what they started to call Omega -- and several indicators of  
21 impairment at Omega/BCH. Dr. Nye, again, concludes that these  
22 disclosures partially revealed information about defendants'  
23 prior false statements.

24 This drop is the one that I referenced earlier on a  
25 company-specific basis, 17.7 percent. The stock fell almost 18

1 percent after controlling for the market and the peers. This  
2 is a very, very big drop.

3 Defendants raise a few arguments here. They again say  
4 that this is not revelatory of the misrepresentations because  
5 this is not -- this is not about Omega integration. It is  
6 about performance. Both -- Mr. Silverman addressed that point,  
7 showed you what Judge Arleo had ordered in connection with  
8 class certification. We have more of that in our brief.

9 Dr. Nye did a detailed assessment of why this was  
10 related to the Omega misrepresentations that had been made. He  
11 does the same for the generic pricing issues. They say -- the  
12 defendants say with respect to this, that we need to give  
13 consideration and effect to the confounding information which  
14 they say was related to the fact that they were -- Perrigo in  
15 this day confirmed that Mr. Papa was leaving.

16 And they also disclosed -- in addition to the  
17 information that I talked about earlier regarding Omega and  
18 generics -- that their other divisions, the CHC division, was  
19 having delayed product launches. And I just want to point this  
20 out because I do think its important. What Dr. Nye looks at  
21 is, he looks at what that information means and what the  
22 significance of it would have been to investors.

23 He says that the analysts, as a proxy for the broader  
24 market, the commentary that they made, their negative reactions  
25 were overwhelmingly related to competitive pressures in

1 generics in the weaker-than-expected Omega performance. He  
2 says that the two pieces of information -- that they are citing  
3 as being confounding -- is being unrelated to the fraud. That  
4 need to be taken out of the loss causation analysis on this  
5 date are Papa's departure. He said the market already knew  
6 that, they adjusted it when it was first announced on the 21st,  
7 no one came out and said it wasn't true.

8         So the market had fully ingested or taken account that  
9 fact as of the date of earnings, on the 25th. He had also said  
10 not a single analyst report cited the CHC, the delay in the CHC  
11 product launches in any way as a result of -- as being a factor  
12 in the re-evaluation of the firm, as of the announcement of  
13 that information on April 25th.

14         So, again, Nye says I can disaggregate this. I can use  
15 valuation principles. I can look at the cash flows that would  
16 be attributed to something like those delayed product launches.  
17 I can measure that. I didn't. I don't have to because that  
18 information didn't cause the stock price to go down on that  
19 day. And so defendants make virtually the same arguments  
20 regarding our May 12th and August 10th disclosures in 2016. I  
21 want to focus just lastly the two disclosures from 2017.  
22 Because defendants make a distinct argument with respect to  
23 those two disclosures.

24         What happened on March 3, 2017 and May 3, 2017, were two  
25 pieces of information related to the government's investigation

1 in the generic antitrust area, and in particular what that  
2 meant for Perrigo.

3 On March 3rd, Bloomberg reported -- during the trading  
4 day -- that U.S. prosecutors are examining the prices of skin  
5 treatments made by Perrigo and a handful of other companies as  
6 part of a sweeping criminal investigation into possible  
7 collusion and the generic drug business.

8 According to the May report, it is based on a court  
9 document. That news came out at 10:25 in the morning. If you  
10 look at an intraday chart showing the ticks during the trading  
11 day, Perrigo stock immediately declined ultimately by around  
12 four percent beginning with the information that was released  
13 there.

14 On May 3rd after the close of the markets on May 2nd --  
15 May 3rd being the next day -- the stock drops, but on May 2nd  
16 the Wall Street Journal reported -- first, Perrigo released an  
17 information that the Department of Justice had executed a  
18 search warrant at its corporate headquarters in connection with  
19 the generic drug investigation.

20 The Wall Street Journal reported that evening on May  
21 2nd -- so this is before the market opens on the 3rd -- that  
22 the execution of search warrants may suggest investigators are  
23 stepping up the probe, searching for evidence to support  
24 allegations of collusion.

25 So on each of these dates, Dr. Nye concludes that the

1 increased regulatory scrutiny was, unsurprisingly, the result  
2 of the very same fraudulent conduct alleged by plaintiff.  
3 Accordingly, as the glare of the DOJ was a direct and  
4 foreseeable consequence of the risk inherent to the company's  
5 allegedly collusive price-fixing scheme.

6           So we provided evidence regarding the relationship  
7 between price fixing and the company statements and this was a  
8 correction of those statements. And we have established  
9 through Dr. Nye's studies that the stock declined both days in  
10 a statistically significant fashion.

11           So defendants' arguments in response to these two  
12 corrective dates is different. Their argument is that the  
13 market already knew about this information. This is what's  
14 referred to generally as a truth-on-the-market defense.

15           Defendants here bear the burden to show equivocally that  
16 the information on these two corrective disclosure dates was  
17 conveyed today the public with a degree of intensity and  
18 credibility sufficient to counterbalance, effectively, any  
19 misleading information created by the alleged misstatements.

20           So what that means in this context is, their prior  
21 information would have told the investors and the public that  
22 they were going to be -- there was going to be news reports  
23 that the generic drug investigation was ramping up, and that  
24 the Department of Justice was going to execute a search warrant  
25 on their headquarters.



1           So we don't think beyond the legal standard, which makes  
2   it very difficult for them to win such an argument on summary  
3   judgment, that the fact that they purport to say were in the  
4   public as of those dates because they were conveyed  
5   unequivocally to the public with a degree of intensity and  
6   credibility. They have not met that standard.

7           So your Honor, that's all I had on loss causation for  
8   now.

9           I think it probably makes sense, unless you disagree,  
10   for us to either take a short break or for me to turn to  
11   argument back over to defendants and I think that they are  
12   going to -- they made motions to challenge our experts and it  
13   probably makes sense for them to argue first on those.

14           THE COURT: We will take a five-minute break, and then  
15   we will come back. It is 3:18. Let's say 3:25.

16           MR. HARROD: Thank you, your Honor.

17           THE COURTROOM DEPUTY: All rise.

18           (Recess taken at 3:18 to 3:26 p.m.)

19           THE COURTROOM DEPUTY: All rise.

20           THE COURT: Thank you, please be seated.

21           MR. HARDIMAN: John Hardiman for Judy Brown, again.  
22   Your Honor, if I get -- and this is probably something Mr.  
23   Wareham said, but I'll say it anyhow -- if I get their theory  
24   here, as long as they say there is a price hike and then they  
25   attach to it, actually, adverbs like astronomical, really high;

1 they get to go to a jury. And that's not what the rule is, all  
2 right.

3         This case is all supposition which is become blindly  
4 obvious from that response. And that is what summary judgment  
5 is meant to weed out and not permit to go to a jury. So a jury  
6 isn't given misleading evidence, supposition, and speculation  
7 in an effort to try and push the plaintiffs to some sort of  
8 settlement. That's why this case has got to go. It surely has  
9 to go against Judy Brown.

10         I said there was no evidence against her own price  
11 fixing, and I must have been right, because what happened when  
12 the plaintiffs were speaking is you will hear -- they kind of  
13 change the case. The case is, and always has been -- as Judge  
14 Arleo said -- a case about hiding a price-fixing scheme.

15         As I said to you before and I'll say again, there is no  
16 evidence Judy Brown knew anything about the price fixing  
17 scheme, the fact that may have know the prices went up, or that  
18 there may be penalties that some prices went up. How does that  
19 possibly translate to knowing there is criminal behavior going  
20 on within the organization?

21         And what they do, what they did was sort of drift away  
22 from that and there was all this talk about, you know, they  
23 withheld the fact they were in a competitive market? What?  
24 That is completely the opposite of a price-fixing scheme. A  
25 price-fixing scheme means that there is no competition, because

1 everyone agrees what the prices are --

2 (Reporter clarification.)

3 MR. HARDIMAN: Completely the opposite what they are  
4 starting to try to work in the case now, but that's not the  
5 case they pled.

6 They didn't plead a case that Ms. Brown or Perrigo kept  
7 from the shareholders the extensive competition in the market.  
8 They pled completely the opposite, and by the way, if you look  
9 at Ms. Brown's statements, the statements they are premising  
10 this case on, the cases would say -- the statements would say  
11 there's a lot of competition in the market.

12 I still don't what they are arguing about with respect  
13 to being insulated from the pricing drama. I mean, yes,  
14 Shkreli's prices were high. He wasn't involved in a  
15 price-fixing conspiracy. No one alleged that.

16 I have to say, your Honor, this idea -- the last refuge  
17 of scoundrels, right, which is -- okay, they didn't know  
18 because they didn't want to know. Wait a minute.

19 Judy Brown, Joe Papa these are people that work really  
20 hard to get big jobs at a big company. You're going to tell me  
21 that it's logical to reasonable inference when they have no  
22 evidence of any price fixing for them to say in a company  
23 selling 800 generic products to assume that in six or so there  
24 might be criminal behavior, and their reaction to that is going  
25 to be good work guys, keep going?

1           People go to jail for that, okay? That is a totally  
2 unreasonable inference. That is them not doing their job.  
3 They brought a case that accused my client of a really bad  
4 thing and it was their job to come up with evidence to show  
5 that was true, and they didn't do it. And then they get to go  
6 to a jury by saying well, maybe, well, she didn't know, but she  
7 didn't want to know. That is preposterous.

8           One thing that really doesn't address my client, but I  
9 just have to mention it because it is just so dumb, this  
10 argument that Brown and Papa sold their stock at a lower price  
11 than what Mylan was offering indicates that they really thought  
12 the Mylan price was okay is ridiculous.

13           When you or I sell stock, ten shares of stock, we get  
14 what the market gives us but when you're selling a whole  
15 company, that's a bigger deal. Because when you sell a  
16 company, you are selling control of the company and you've got  
17 to get a control premium for that company.

18           In mergers and acquisitions law -- believe me, we have  
19 enough law today. I don't need to get into that. In mergers  
20 and acquisitions law, you have a duty to get the highest price  
21 possible. The plaintiffs know that. Their firms wrote that  
22 law, and, therefore, this comparison between what I sell  
23 something on the market and what I'm selling an entire company  
24 is ridiculous and when people say things like that, your Honor,  
25 you should question all of their arguments.

1           Now going to integration, again, it was a very  
2           undisciplined presentation. As I warned at the outset of my  
3           argument, a lot of their arguments went into time periods that  
4           have nothing to do with what Mrs. Brown knew on June 23rd when  
5           she spoke. They talk about the problems of the impairment in  
6           2016. None of that has anything to do with the issues on  
7           June 23rd.

8           They said at one point that she knew in the  
9           preintegration process before the closing that revenue was  
10          overstated at Omega. That is the IRFS GAAP problem that we  
11          spoke about. Under the IRFS rules, you record revenue  
12          differently than under GAAP. Therefore, it had to be fixed.  
13          And as you saw from the documents I showed you, it was fixed  
14          and it was getting fixed by the time she talked on June 23rd.  
15          As a matter of fact, he admitted that the statements she made,  
16          the modest statement, We're online, back office is online, he  
17          admitted that the back office stuff she is referring to is the  
18          IRFS GAAP issue. And, yes, the documents show quite clearly  
19          that that was getting remedied.

20          By the way, I never asked you -- I didn't ask you to  
21          take any inference from any document. I asked you to read them  
22          because if you read them, they come out our way.

23          The Coucke document, I already told you the only way I  
24          think that can reasonably be read. They referred to a document  
25          the next day in which Mr. Coucke said that what I think we need

1 is marriage counseling. Precisely my point. The issue wasn't  
2 that the things that needed to be integrated, the nuts and  
3 bolts of putting the companies together wasn't working. His  
4 problem was that it was working with Perrigo, basically, taking  
5 over and he needed to talk to people about that, which is, by  
6 the way, why, obviously, the CFO got on the plane to go meet  
7 with him because the guy was upset and he was having a tantrum,  
8 not because -- that doesn't indicate anything was going wrong  
9 with respect to putting the companies together. On the day  
10 before she spoke, she had a memo from her staff saying all the  
11 succusses to date with respect to integration and those were  
12 the things that were the nuts and bolts of getting done about  
13 integration. That's all I've got.

14 Thank you, your Honor.

15 THE COURT: Thank you, Counsel.

16 MR. BRODSKY: Your Honor, I'll try to be relatively  
17 short.

18 Mr. Silverman went through a litany of document after  
19 document after document. Didn't quote from almost all of them.  
20 Misquoted it or misstated what it was. Didn't give you the  
21 timing of exactly what statement was at issue by Mr. Papa or  
22 Ms. Brown and what was known at that time and mixed up time  
23 periods, but I'll go through a few examples to point that out.  
24 I would just ask your Honor what we did in our presentation was  
25 actually show the documents and the words on the page because

1 the words on the page of the documents, they all go in favor by  
2 the plain language of the defendants. The interpretations they  
3 are insisting people can make, well, they have those  
4 interpretations. The first thing I'd like to do, though, is  
5 Mr. Silverman besmirched Mr. Papa by suggesting that they  
6 didn't go past five hours because he said I don't recall a  
7 number of times.

8 And you know what I thought we would do? Let's go  
9 through the first ten times he said I don't recall. Let's look  
10 at what he actually said because I'd urge you to do that. He  
11 tried to suggest Mr. Papa wasn't giving the answers, that he  
12 was trying to avoid answers. Let's go through the first half.

13 The first time he was asked: What was your position at  
14 the time of the deposition you are referring to?

15 I don't recall to the best of my recollection, and then  
16 he gives the answer. Well, that's one I don't recall. One out  
17 of one is an attempt to answer the question.

18 Number 2, in a personal capacity, yes, he said as part  
19 of my company, the company has been involved.

20 Are you asking me specifically in a personal capacity?  
21 Yes.

22 He said, I don't recall being involved in any additional  
23 lawsuits beyond those that had been part of the company.

24 That's true. That's a true statement. Two out of two.  
25 Let's go to the next I don't recall.

1           Two out of two reasonable I don't recalls, if you can  
2 get there.

3           Yes. When was the last time you spoke to  
4 Bradley Joseph?

5           I don't recall speaking with Bradley Joseph since my  
6 departure from the Perrigo company.

7           That's true. He did not speak to Bradley Joseph, and he  
8 didn't recall. That's three out of three reasonable I don't  
9 recalls.

10          Let's go to the fourth.

11          Down below, how large was Watson during the time he  
12 served as president?

13          I don't recall the specific numbers, sir.

14          And then he was asked, was is it something that you  
15 considered to be a large pharmaceutical company?

16          Answer: I don't know how you define large. I believe  
17 it to be a good company. I don't know.

18          How can that be considered a nonresponsive answer?

19          Let's go to the next I don't recall.

20          While you were at Watson, did you work with anyone who  
21 later worked at Perrigo?

22          I don't recall anyone from Watson Pharmaceuticals coming  
23 and joining the Perrigo company.

24          Not a false answer, a true answer.

25          To your knowledge, did you work with anyone at Watson



1 who later worked for another company?

2 I don't recall any specific individuals. I'm sure there  
3 was some people.

4 I could go on and on. Every I don't recall -- almost  
5 every I don't recall was I don't recall, but here is what I can  
6 tell you. I don't recall, but if you have my calendar. I  
7 don't recall, but let me give you the information I have.

8 So they didn't spend five hours with -- more than  
9 five hours with him because they didn't want to ask the hard  
10 questions and they didn't like the responses.

11 Let's go through a few documents.

12 If we put up -- they mentioned Exhibit 386, and they  
13 said Exhibit 386 was a significant document. Mr. Silverman ran  
14 through these one after the other so fast, so rapid, I could  
15 hardly understand what he was saying.

16 July 14, 2015, he offers this document from  
17 Mr. Farrington to Joseph Papa and others. It's about the  
18 integration reset.

19 I encourage your Honor. He interpreted it as some kind  
20 of evidence that there was wrongdoing or that there was some  
21 serious problem at Omega. I urge your Honor to look at that  
22 document and look through it because he is wrong. It's -- it  
23 doesn't exist.

24 And, in fact, let's assume he is right. Let's assume it  
25 showed some issue with Omega, some problems with the

1 integration process. That document is dated July 14th.

2 Let's go to the disclosure on slide 31 of our  
3 presentation, and let's look what happens on August 13, 2015,  
4 in terms of a disclosure. Quote, We face risks associated with  
5 successful integration of our recently acquired Omega business,  
6 and it gives all the issues or problems one can encounter.

7 I challenge them to talk to your Honor about these risks  
8 that were disclosed. I challenge them to answer certain  
9 questions, and they didn't want to do that.

10 Let's go to the next one.

11 They put -- if we can, go to my slide 44.

12 They mentioned this really quickly. They threw it out  
13 there. They suggested that Mr. Papa was saying on this date of  
14 August 5th that the integration was delivered, that they,  
15 quote, It was over. Integration was over, Omega integration.

16 He used the words, and we highlighted it in our  
17 presentation as he talks, I would like to start by thanking  
18 Perrigo employees for their diligent focus, and he says,  
19 delivered on our Omega integration plans.

20 We all know here, because of all the disclosures before  
21 this and after it by Mr. Papa in the SEC filings, that they  
22 kept saying that the integration is going to take two or three  
23 years. That does not mean we're done with the integration. We  
24 just closed in March, and we're completely finished. That's  
25 not a reasonable inference to be drawn from the evidence. That

1 is a Hail Mary. That is not even colorable under the summary  
2 judgment standard.

3 Let's go to another one. I can't go through them all,  
4 but I'm just going to go quickly to another one.

5 Slide 27, this is another one they put up there and this  
6 is one where they doubled down, your Honor, on what I would say  
7 is, at best, a very significant material omission from page 55  
8 of their opposition brief. They doubled down on your Honor and  
9 said, You should draw -- look at this plain language, and you  
10 should decide this is a jury question as to whether Mr. Papa  
11 said the overall comment is flat to up slightly is a reference  
12 to a specific product or specific category. I respectfully  
13 submit that epitomizes their entire case.

14 And if you go to the next slide, if your Honor looks at  
15 the plain language, and that is what, thankfully, a United  
16 States District Court judge has the power to do, you,  
17 your Honor, have the power to look at the plain language and  
18 decide that their interpretation is so far beyond the pale of  
19 unreasonableness that it cannot belong in a courtroom in front  
20 of a jury, and that is why district court judges are  
21 gatekeepers to evidence.

22 Plaintiff lawyers, defense lawyers don't get to decide  
23 what juries get to see and in this particular instance, their  
24 interpretation is not even within the realm of reasonable. I  
25 think it epitomizes many things about their view of the

1 evidence.

2 I don't think they had an answer for your Honor as to  
3 why they excerpted all of that language above from page 55 of  
4 their brief. I wish they did.

5 I would like to go to my slide 22 because I think they  
6 misspoke unintentionally, I assume, when they described as  
7 Mr. Silverman said that Mr. Papa said pricing was sustainable.  
8 That's a quote from him as I heard him say it. Now there is a  
9 transcript so people can look back.

10 That is not Mr. Papa's words. He was at a conference,  
11 Mr. Papa, speaking and Mr. Goodman from UBS Securities asked  
12 him how sustainable you feel like those increases are? Thanks.  
13 Asked about the generics business, how sustainable are the  
14 price increases? He never uses the word sustainable. In fact,  
15 Mr. Papa's answer avoids using that, and, essentially -- the  
16 language is right there -- says, Our team has done a good job  
17 looking at pricing and will continue to look at it.

18 Last two lines, We think there is something that we'll  
19 be talking about in the future for pricing. There is no, we  
20 think it's sustainable.

21 So it's not reasonable for any lawyer to claim Mr. Papa  
22 said words he did not say.

23 They -- Mr. Silverman also said that Mr. Boothe and  
24 another corporate representative said Mr. Papa was involved in  
25 pricing decisions. Mr. Boothe's transcript, page 27 to 28,

1 actually said in a general question of who was involved in  
2 pricing, at the very end, sometimes there might be input from  
3 the CFO or CEO. That is not evidence that there was input with  
4 respect to any particular date, time, drug.

5 And then the other corporate representative said, and  
6 they didn't quote him right, quote, Very well could have been  
7 raised with Mr. Papa referring to pricing.

8 Your Honor, if a witness got up on the stand and was  
9 asked a question before a jury, could you very well have been  
10 informed of something? Your Honor would sustain that  
11 objection. It's like asking somebody is it possible that this  
12 could have occurred? Anything is possible. Is it possible  
13 Mr. Papa could have been consulted? Could have happened.  
14 That's not admissible evidence, and so they are relying on  
15 inadmissible evidence.

16 Mr. Silverman also said that Mr. -- I could not believe  
17 my ears. He actually said you could draw an inference, he  
18 thought, a reasonable inference from the fact that Mr. Papa  
19 attended some industry conferences years ago prior to the class  
20 period and somehow you could draw some inference that he knew  
21 about some kind of price hike and price fixing from it. I  
22 mean, that's pure speculation. That's not a reasonable  
23 inference.

24 Then there's the issue of selling shares.

25 I got so confused by this because I thought -- and two

1 final issues, one, they said that Mr. Papa, I think they also  
2 said Ms. Brown, sold shares after December or around December  
3 2015, maybe early 2016, lower than the Mylan tender offer  
4 price. So if I -- and that's evidence that somehow they had a  
5 the motive to do something wrong with respect to the tender  
6 offer or to give the market misinformation.

7 Now, if I have their facts right, they are saying that  
8 Mr. Papa and Ms. Brown decided, let's defeat the tender offer  
9 which will give us \$150 a share, make us rich. We will walk  
10 out of here with a fortune. They had so many shares. They  
11 never have to work again. But you know what we're going to do?  
12 We're going to fight the tender offer under our fiduciary duty  
13 to represent all shareholders. We're going to give up all of  
14 that money so that we could try to sell it at a lower price  
15 later.

16 That is the scheme? That's the plan? It belies common  
17 sense. Once again, I respectfully submit, they have the  
18 stubborn fact they have to deal with that Mr. Papa stopped his  
19 10b5-1 plan. He didn't have to, and didn't sell shares when  
20 the Mylan tender offer price drove the stock price through the  
21 roof and he gave up a fortune of money. That's a stubborn fact  
22 they can't get around that undercuts any idea of motive.

23 And then finally, I think I heard somebody say up here  
24 that if the stock price drops on any day, then it's not because  
25 a company is disclosed something legitimately that they just

1 learned or that's happened over the last quarter. It's that  
2 some fraud happened. And that's not the law, your Honor. If  
3 that were the law, then any company on any given week, because  
4 it happens every week, when their stock price drops 10 percent,  
5 20 percent, there had to have been fraud.

6 That is the kind of conclusory thinking that's not  
7 proper, and before any district court, especially at the motion  
8 for summary judgment stage.

9 Your Honor, thank you very much for your time today.  
10 You have been incredibly patient. I don't know if you have any  
11 questions?

12 THE COURT: No questions. Thank you, Counsel.

13 MR. BRODSKY: Thank you, your Honor.

14 MR. WAREHAM: Thank you, your Honor.

15 Mr. Silverman referenced this class notice concept, that  
16 the class notice can expand the case. Plaintiff's  
17 characterization of the class notice's brief description of the  
18 case as binding. It's interesting because they don't cite a  
19 case to that effect in their brief, and that's because there is  
20 no such case in the land.

21 And, of course, the Court was very clear in issuing the  
22 class notice. That the controlling document for purpose of  
23 that notice was the amended complaint. The Court held on  
24 November 11, 2019, as reflected in the class notice order, the  
25 classes may pursue the following claims as set forth in the

1 amended complaint and consistent with the Court's opinion and  
2 order of July 27, 2018. The complaint clearly alleges nothing  
3 about Omega's performance. The Court's motion to dismiss the  
4 opinion did not permit the plaintiffs to pursue claims about  
5 Omega's performance.

6 Now, unsurprisingly this is quite consistent with  
7 operative case law. The operative complaint controls -- and is  
8 the document where the complaint and notices of class members  
9 are to look. And any confusion about those documents go to the  
10 amended complaint. And the Court in the *EOC v. State PUC* case  
11 makes it crystal clear. Any conflict tie goes to the amended  
12 complaint. Logical. It makes total sense. Consistent with  
13 every case in the land.

14 Plaintiffs wanted to conclude or now want to include  
15 claims about Omega's performance in their case. That time is  
16 long past. They could have amended the complaint. They did  
17 not.

18 Now, as a technical matter and brief point with respect  
19 to this class notice, there are two class notices, your Honor.  
20 One goes to the shareholders in Israel and one goes to the  
21 shareholders in the United States. And they are inconsistent.  
22 The one in Israel doesn't talk about performance, and the one  
23 in the United States has, as the plaintiff's said, does talk  
24 about performance. It also says, for any conflict, go look at  
25 the amended complaint. Again, there is a reason they cite no



1 case in support of this bizarre theory, none exists.

2 Now, Mr. Silverman said, your Honor, with respect to the  
3 Sherman Act that the plaintiffs need not demonstrate unlawful  
4 collusive pricing to survive this motion for summary judgment.  
5 But, your Honor, in the complaint, the plaintiffs allege that,  
6 quote, defendants failed to disclose uncharged illegal conduct.  
7 That's their argument.

8 And the record lacks any evidence at all of illegal  
9 conduct. The plaintiffs have failed today show any basis for  
10 securities fraud claim. Judge Arleo made it clear in her  
11 motion to dismiss opinion that plaintiffs securities fraud  
12 claims must fall, whereas here there is no evidence of  
13 collusion.

14 She wrote, and this is clear, the allegations here and  
15 the misrepresentations and omissions identified in the amended  
16 complaint concerning collusive pricing are sufficient to  
17 withstand a motion to dismiss. That's it. Criminal issues,  
18 collusive pricing, not some state of the market, not some  
19 competitive babble that we're hearing now in the papers. It's  
20 not part of the case.

21 Now, with respect to loss causation in Mr. Harrod's  
22 presentation on loss causation, first he made the statement at  
23 one point in time that some argument was circular. Let me give  
24 you the most circular argument I've heard today, and I've heard  
25 a lot from this side of the table. And that is that on the

1 10b-5 side of the case, they claim that these so-called  
2 misrepresentations equal \$63 worth of overstatement in  
3 Perrigo's price.

4 And yet, on their 14(e) claims, they claim to get the  
5 benefit of that. That the 174 that they are using as the  
6 Perrigo trading price is the measure of damages. Well, how can  
7 that be? How can you say on the one hand the price is inflated  
8 \$63 and on other side say, I get the benefit of the inflation.  
9 Talk about circular.

10 We also talk in our papers at some length about the  
11 realities of 14(e) claims, your Honor. And the way they are  
12 really supposed to be handled, and it's not in cases like this,  
13 postoperatively. The Supreme Court held in a leading case  
14 under section 14(e) that in corporate control contests the  
15 stage of preliminary injunctive relief rather than post control  
16 lawsuits is the time when relief can best be given.

17 That's the *Piper v. Chris-Craft* case, your Honor, at 430  
18 U.S. 1. And indeed, in this very case, Mylan, when it proposed  
19 its tender offer, brought a section 14(e) claim against  
20 Perrigo. They did so in the fall of 2015. During the pendency  
21 of the tender offer itself. And Mylan saw an injunctive relief  
22 based on the allegation, quote, If Perrigo shareholders were to  
23 refuse to tender their shares based upon Perrigo's false and  
24 misleading statements, they would be irreparably injured by  
25 losing the opportunity to make an informed decision on Mylan's

1 offer.

2 Sound familiar? It kind of sounds what they are saying  
3 postoperatively.

4 Now, Mylan sought an order in joining and directing  
5 Perrigo to provide corrective disclosures to their  
6 shareholders. And enjoining them from making further false and  
7 misleading statements. That went down to the southern district  
8 of New York, not too far away. They denied Mylan's request for  
9 that injunctive relief. They did so on October 29, 2015.

10 In this entire country's history, and the plaintiffs  
11 cannot cite one, there are no cases where a Court has ever  
12 permitted to proceed past the summary judgment stage a 14(e)  
13 claim premised on the notion that if only the allegedly  
14 concealed information would have been disclosed, a tender offer  
15 would have succeeded rather than failed.

16 We are not aware of one because there isn't one.

17 A few conclusory comments, your Honor, in connection  
18 with the motion for summary judgment.

19 There is a dearth of disputed admissible evidence. I  
20 think that's clear through today's argument. That's just a  
21 fact.

22 Now, no torture effort to squeeze civil adversarial  
23 complaints or confidential settlements with no connection to  
24 Perrigo and Spartan conclusion affidavits to a narrow hearsay  
25 exception can save this case, can change the lack of evidence.

1 No number of supposed experts with a history of being excluded  
2 for offering the same form of inadmissible statements as  
3 offered here can save this case.

4 No one's seen an unprecedented use of the errata sheet  
5 to reverse clear testimony gutting a claim can alter this  
6 landscape. Plaintiff's heavy reliance on the so-called witness  
7 like Ms. Kincaid, who could not pick Mr. Papa or Ms. Brown out  
8 of a crowd of two, and who under oath testified the exact  
9 opposite of what they were representing in the complaint she  
10 was going to say can save this case.

11 You might have recognized, your Honor, the only words --  
12 the only people using the word Kincaid were myself. We never  
13 heard the name Christine Kincaid from those folks, and you know  
14 what, I would be bloody embarrassed myself.

15 No matter of time with some lawyer telling the Court  
16 minimal means no can save this case. Minimal doesn't mean no.  
17 Minimum means minimum.

18 No amount of guesswork about how we might try the case,  
19 we might open the door, we might wow this hearsay evidence and  
20 circumstantial evidence to come in because we are stupid enough  
21 to let that happen, guess what might happen in front of a jury  
22 can save this case.

23 Promises to deliver witnesses, your Honor, who did not  
24 show up. Their witnesses under subpoena did not show up.  
25 These are the two fellows from Sandoz who know little about

1 much. Can deliver this case from summary judgment. And are  
2 they going, maybe they will come, maybe they won't. But what  
3 they will testify to if anything was events that are now 11,  
4 and 12 years old about a dead man. That doesn't move this case  
5 an inch. Doesn't survive this motion.

6 Now, attempts to rely on events that took place long  
7 before an event or long after an event in an effort to  
8 misconstrue a defendants' state of mind cannot substitute for  
9 missing evidence. Blatant mischaracterization of Mr. Papa's  
10 statements about portfolio wide pricing strategy salvaged  
11 nothing. We have seen that very clearly from Mr. Brodsky.

12 Now, no Nostradamus like prediction about what the Third  
13 Circuit might someday do with respect to corporate scienter.  
14 They are going to first adopt it even though they haven't done  
15 it in years, and then they are going to pick the one avenue in  
16 which plaintiffs can survive on a corporate scienter. That's  
17 going to happen. Let's go to the jury so that we can let the  
18 Third Circuit get off its hind legs and do something it hasn't  
19 done forever. That's not how cases get to the jury.

20 I saw here today something that worried me. They are so  
21 clearly misrepresenting the state of this market, and so  
22 clearly complaining about things that are normal in a naturally  
23 occurring oligopolistic market that I feel a jury  
24 nullification. I fear that they are trying to say to somebody,  
25 a loaf of bread got multiplied by 500 percent. This is -- a

1 loaf of bread is not a topical generic Rx product. Okay? It  
2 is a loaf of bread. And jurors are not to be misled in ways  
3 like that.

4 The law on the Third Circuit's point of view with  
5 respect to oligopolistic markets is crystal clear. It is in  
6 *Valspar*, it is in *Baby Foods*, and it's in *Chocolate*. And to  
7 let a jury kind of take a whack at nullifying those I think  
8 would be a gross injustice.

9 Now, these theories that they have left barely, barely,  
10 barely survived a motion to dismiss. And after years of noisy  
11 and wasteful discovery, it is time to put up or shut up. And  
12 plaintiffs must defend, your Honor, the claims they pled. Not  
13 ones they wished they pled.

14 Two critical documents govern what's in this case. The  
15 operative complaint, the amended complaint which they wrote,  
16 and the Judge's opinion narrowing that and sending to your  
17 Honor these two issues. The integration -- present sense of  
18 integration of Perrigo into -- Omega into Perrigo and the  
19 price-fixing conspiracy on six products. No number of cries to  
20 please, please, please, your Honor, let us go to a jury, can  
21 save this case.

22 Stripped of this entire set of contortion  
23 and speculations, your Honor, this is really a pretty bloody  
24 easy case. I ask you right now to, please, silence these  
25 plaintiffs and to dismiss this case.

1 THE COURT: Thank you, Counsel.

2 MR. WAREHAM: Thank you, your Honor.

3 MR. SILVERMAN: Thank you, your Honor. Given this  
4 late hour, I don't know how this will be taken, but I'm not so  
5 easily silenced. I have been called over the last half hour  
6 and earlier this morning dumb. My argument is silly. That I'm  
7 arguing a last refuge of scoundrels. That we are  
8 undisciplined. I don't have the same kind of pejorative  
9 comments for my adversaries. I think they actually put forth  
10 some very creative, strained inferences. But there are  
11 creative arguments that I think, you know, will be something  
12 that will have to grapple with in front of the jury. But that  
13 is the place --

14 I'll be real quick on the substance.

15 First, Mr. Hardiman misstated our competitive  
16 environment claims. They've been the same since day 1. It's  
17 real simple. Perrigo said to instill in a confidence in  
18 investors that the generic drug price profitable was  
19 sustainable. They told investors that they achieved that  
20 profitability despite operating in a competitive environment.  
21 Sometimes they said obviously competitive. Sometimes they had  
22 they said heavy competition.

23 But that suggested to investors that there is  
24 sustainable profitability when instead they are relying on  
25 unsustainable pricing opportunities. That's the nature of the

1 claim. It was in the amended complaint. It was in the class  
2 notice. It was not rejected by Judge Arleo. It's still -- it  
3 has been part of the case since day 1.

4 Second, there was a comment by, I believe, both  
5 Mr. Hardiman and Mr. Brodsky that denigrating Mr. Coucke as if  
6 he was just some guy who was a little bit begrudged. Well, he  
7 wasn't some guy. He was the CEO of Omega. You can't integrate  
8 Omega without its CEO. What a CEO has to say is a very high  
9 level, important commentary on the nature of the integration.

10 He was also a Perrigo director during most of his -- the  
11 time between when he -- Omega was acquired and when it left.  
12 So he was a guy with a lot of influence and power there.

13 Mr. Brodsky spent a lot of time arguing about inferences  
14 to try to rehabilitate Papa, whether or not he was credible at  
15 his deposition.

16 That just shows you we are now in the prohibited  
17 territory from the Third Circuit. You don't -- you don't  
18 decide credibility at summary judgment. The Third Circuit says  
19 that's within the exclusive province of the jury.

20 In terms of what was an integration reset, he says infer  
21 that it's -- that the term "integration reset" means something  
22 other than reset, and it's consistent with it being online.

23 I don't think that's a very convincing argument, but,  
24 again, that's an inference. A jury decides whether to accept  
25 that inference, however strained it may be or not.



1           With respect to the class notice, the class notice  
2 didn't expand the case one bit. It just -- as all the parties  
3 here agreed and as Judge Arleo agreed, it consists -- it  
4 concisely described the claims at issue in the case as it  
5 existed at that time. They have always been there.

6           Now, Ms. Kincaid, they are right. I didn't mention  
7 Ms. Kincaid, and there is a reason for that. I don't expect  
8 that she will be a witness at trial. She -- at the pre-motion  
9 to dismiss stage, at the amended complaint stage, she came  
10 forward and she said a lot of stuff. We got her -- she, in  
11 fact, was asked to verify that in writing. We sent her this is  
12 what we think you said, and she said approved indicating that's  
13 what she did, in fact, say, and she admitted that at  
14 deposition.

15           But she also did have all kinds of stories that may make  
16 her a little less credible than we initially thought. We don't  
17 anticipate that she will be a big part of our case or theirs,  
18 but if they call her, they will -- the jury will hear that she  
19 agreed to every single word that's in the amended complaint  
20 from her.

21           There's also been lot of assertions in this that the  
22 defendants respective denials of their own misconduct somehow  
23 are what matter here. They may be convincing in front of a  
24 jury, but they are not what matters at summary judgment.

25           Outside the securities context, the Third Circuit had to

1 visit this issue just a few weeks ago in a case called  
2 *Zamichieli v. Pennsylvania Department of Corrections*, 2022  
3 U.S.F. Lexus 6473 at star 12 to 13. That's Third Circuit,  
4 March 14, 2022. The Third Circuit held that a jury was free to  
5 disbelieve a defendants' self-serving assertion of his and his  
6 fellow defendants' states of mind in light of circumstantial  
7 evidence supporting intent.

8 That's what we have here. We have some direct evidence,  
9 some circumstantial evidence, but we have loads of evidence.  
10 They just prefer that it not reach a jury, and I can understand  
11 why. I can understand why.

12 The fact that the CEO of Omega is saying that the  
13 integration, that nothing is going right, doesn't make their  
14 client's comments seem honest when they tell investors it is in  
15 line and going smoothly. I can see why, but that's for the  
16 jury to decide.

17 Finally, with the expect -- with the attempt to divorce  
18 integration and performance, number one, there is no order from  
19 Judge Arleo that says performance is out of this case. There  
20 is no order on the -- the one reference that they cite is from  
21 a footnote, not from an order, not from a holding of her  
22 opinion. It is a footnote that says when she is considering  
23 the holistic inference of scienter, which as we described from  
24 the Bristol-Myers Squibb case, it's a totally different  
25 standard than the jury considers at trial or your Honor has

1 before him at this summary judgment stage, but when she  
2 considered that, when she weighed that under the PSLRA's  
3 heightened pleading standard requirement, she didn't find the  
4 allegations of underperformance in a couple markets convincing.

5 But here is what we now know. We now know that  
6 performance was temporarily juiced.

7 Why do we know that? Because Perrigo's own documents,  
8 as well as Omega's, show that. The internal audit report shows  
9 that, that in Q2, 2015 it was spiked. And it says that Q2,  
10 2015 was manipulated by loading practices. So we know that  
11 that related, and it was the very integration of the two firms  
12 accounting that revealed all of those practices.

13 So you can't divorce integration from that respect. You  
14 also can't divorce integration and performance because the  
15 integration problems were exactly what caused, according to  
16 Omega, the performance declines.

17 The Omega CEO, Coucke, said in July 2015 that because of  
18 integration problems, they had made it -- that Perrigo had made  
19 it impossible to run the business. We're out of oxygen, he  
20 said. That's Exhibit 180.

21 In Exhibit 195, the Omega presentation that was given to  
22 Brown and Papa and Farrington described Omega Pharma's  
23 situation as declining vastly and lists integration activities  
24 as causes of problems.

25 Exhibit 197, Omega's CEO, Coucke, advised Papa that,

1 quote, The actual bad results of Omega are due to all reasons I  
2 am warning for months.

3 What had he been warning for months, that the  
4 integration attempts of Perrigo were causing problems  
5 interfering with his -- the operation of his business and  
6 starving the company of oxygen. They are one in the same. Our  
7 claims have been consistent throughout this. All of the Omega  
8 and generic drug claims that we describe in our summary  
9 judgment brief and all that are described in the class notice  
10 have been with us all along. These aren't an expansion in any  
11 way, shape or form.

12 So this comes back to the central issue here.

13 Are we here to decide inferences? Are we here to accept  
14 one party's spin over another? Absolutely not. That would be  
15 error. The Third Circuit has made that clear. We must allow  
16 the jury to decide between the reasonable inferences. We must  
17 allow the jury to decide credibility. We must allow the jury  
18 to weigh evidence. That is what Rule 56 requires, and I will  
19 leave the loss causation issues to Mr. Harrod.

20 Thank you, your Honor.

21 THE COURT: Thank you.

22 MR. HARROD: I will be very brief, your Honor.

23 I think -- I can't remember which one of the -- if it  
24 was Mr. Brodsky -- I think it was Mr. Brodsky said that I said,  
25 Every time a stock drops, it indicates there was prior fraud.

1           I don't think that that's what I said. Like you said,  
2 we can look at the transcript and see what I said, but let me  
3 just be clear. A big stock drop means that the market wasn't  
4 expecting the information, and in the circumstances that we're  
5 talking about here with the seven corrected disclosures, we  
6 allege and connect those to the misrepresentations.

7           The market was undoubtedly surprised. Their expert, who  
8 is a superstar professor at Harvard -- you could ask him. He  
9 will tell you -- doesn't contest that the information reaching  
10 the market on the seven corrected disclosure dates was  
11 surprising, that it caused a statistically significant decline.  
12 So that's the one thing I wanted to respond to about that.

13           Mr. Wareham talked about -- I guess he talked about the  
14 circular area of the 14(e) claim and about how we could have  
15 gotten injunctive relief, and he said that there are no cases  
16 upholding a 14(e) claim under these circumstances.

17           If you look at their brief, I will concede that there  
18 are not a lot of 14(e) cases under this circumstance, but the  
19 law and the statute is very clear. You can't make  
20 misrepresentations in connection with a tender offer. If you  
21 do, you basically bought the damages that come from that.  
22 That's what our theory is.

23           He doesn't have a case. They don't have a case finding  
24 that a situation like this one cannot be successful for the  
25 plaintiffs in the context of a 14(e) claim. So that's that.

1           With respect to the question of we could have gotten  
2     injunctive relief during the pendency of the tender offer,  
3     well, if you look at the sequence of events and the timing of  
4     when things became known to the investors, our claims that they  
5     violated 14(e) didn't become known.

6           The first corrective disclosure is in 2016. So if he  
7     thinks that I had some ability to bring a claim in 2015 making  
8     these allegations about misrepresentations before these people  
9     told the market about them, I would like to know how I could  
10    have done that. But there would have been no way for me to get  
11    injunctive relief in 2015 about events that the defendants are  
12    alleged to have withheld held from the investors. So I don't  
13    think that that argument gets them very far.

14           I appreciate your Honor's time and patience this  
15    afternoon.

16           Thank you.

17           THE COURT: Thank you, Counsel.

18           MR. WAREHAM: Your Honor, we would propose to move the  
19    Daubert motions, if that's acceptable.

20           THE COURT: That's acceptable.

21           MR. WAREHAM: Thank you very much.

22           THE COURT: How long do you anticipate we will need  
23    for the Daubert motions?

24           MR. GRONER: I will try to get him down to like  
25    ten minutes --

1 THE COURT: Okay.

2 MR. GRONER: -- considering it's late in the day.

3 Thank you, your Honor.

4 THE COURT: I think that time will come.

5 MR. GRONER: Good afternoon, your Honor.

6 THE COURT: Good afternoon.

7 MR. GRONER: My name is Samuel Groner.

8 The admissibility of expert testimony is governed by  
9 Federal Rule of Evidence 702 and *Daubert v. Merrell Dow*  
10 *Pharmaceuticals*.

11 The Third Circuit held in the *In Re: Zolof* case that  
12 any step in the expert's analysis that renders the analysis  
13 unreliable under the Daubert factors renders the expert's  
14 testimony inadmissible.

15 Furthermore, experts may only offer an opinion on a  
16 subject about which they possessed, quote, specialized  
17 expertise. That quote is from the *Elcock v. Kmart* case from  
18 the Third Circuit. I am going to walk through each of the  
19 plaintiff's experts and show why they don't meet the standards.

20 First let me discuss William Purcell.

21 Plaintiffs seek to use Mr. Purcell to spin out their  
22 version of the facts through the mouth of a so-called expert.  
23 Mr. Purcell claims he is an investment banking and financial  
24 expert offering testimony about information that investors find  
25 important. However, Mr. Purcell's reports largely consist of

1 discussion of topics outside the scope of permissible expert  
2 testimony.

3 First, on pages 58 to 59 of our opening brief, we  
4 provide a long list of examples of Mr. Purcell improperly  
5 speculating about the defendants' state of mind, knowledge, or  
6 intent. Because Mr. Purcell's reports are full of speculation  
7 about defendants' supposed knowledge, the proper remedy here is  
8 exclusion. That is the approach the Court took in the 2008  
9 *Highland Capital Management LP v. Schneider* decision cited in  
10 our brief in which the Court excluded Mr. Purcell's testimony  
11 for attempting to, quote, opine on a party's state of mind.

12 In the 2008 *Highland* decision, the Court explained that,  
13 quote, Purcell cannot state assumptions or make inferences  
14 regarding the knowledge of certain employees because such  
15 inferences lie outside the bounds of expert testimony.

16 That's not the only time Mr. Purcell's opinions have  
17 been excluded for this exact reason. In *VSI Holdings v. SPX*,  
18 also cited in our brief, the Court excluded testimony from  
19 Mr. Purcell about what either parties intent was and, quote,  
20 whether either party was honest. Once again here,  
21 Mr. Purcell's opinions on these topics should be excluded.

22 Second, Mr. Purcell's opinions should be excluded  
23 because he opines on whether defendants' statements were false  
24 or misleading, and I'm not going to go through each statement,  
25 but on page 60 of our opening brief, we list the spots where he



1 does that.

2           The quotations are not ambiguous. Mr. Purcell  
3 repeatedly opined that Perrigo made false and misleading  
4 statements and omitted information that he believes was  
5 necessary for Perrigo's public statements not to be misleading.  
6 Mr. Purcell's similar testimony was excluded in the *Brown*  
7 *Jordan International v. Carmicle* case, again, cited in our  
8 briefs, in which the Court found Mr. Purcell's legal  
9 conclusions were a quote, inappropriate subject of expert  
10 opinion. So we're seeking to exclude him for doing the exact  
11 same things that Courts have excluded him for doing before.

12           Exclusion of testimony by an expert that a challenged  
13 statement was false or misleading is particularly appropriate  
14 in a securities case where one of the ultimate issues in the  
15 case is whether the statement is false or misleading. The  
16 Court in the *SEC v. ITT Educational Services* case, that's cited  
17 on page 60 of our opening brief held just that. That experts,  
18 quote, may not testify that the disclosures were misleading  
19 because the jury will make those determinations.

20           And, finally, one final point with regard to  
21 Mr. Purcell's testimony, he opines on the applicable disclosure  
22 standard.

23           As the Court held in the *ITT* case, a company's  
24 obligation to disclose information is governed by a standard  
25 and defined by the law. An expert testimony regarding the

1 standard encroaches on the Court's role of instructing the  
2 jury.

3           The Court in the *ITT* case made clear that an expert's  
4 opinion regarding whether defendants' complied with that  
5 standard is not appropriate. Yet here, Mr. Purcell improperly  
6 offers opinions on both the applicable disclosure standard and  
7 whether the defendants satisfied it.

8           Mr. Purcell opined that defendants are governed by a,  
9 quote, Full disclosure, close quote, standard, meaning they  
10 must -- and, again, I'm quoting -- quote, Tell everything. Let  
11 it all hang out.

12           That's a clear misstatement of the law. In *TSC*  
13 *Industries v. Northway*, the Supreme Court specifically advised  
14 against using this full disclosure standard. The Supreme Court  
15 warned that if that standard was used, companies might --  
16 again, this is a quote from Supreme Court -- The company might  
17 bury the shareholders in an avalanche of trivial information.

18           In the *ITT* case, the Court excluded opinions nearly  
19 identical to those offered here by Mr. Purcell. The expert in  
20 *ITT* advanced the same full disclosure standard and opined that  
21 the defendants did not achieve full disclosure. The Court  
22 excluded that testimony, explaining that it did not need an  
23 expert to set forth what defendants were legally obligated to  
24 disclose, and it was improper for an expert to opine regarding  
25 whether defendants complied with legal obligations.

1 I will speak very briefly about Dr. Nye and Mr. Clark.  
2 Those will be even briefer than the discussion about  
3 Mr. Purcell.

4 With regard to Dr. Nye. Dr. Nye gives opinions on  
5 section 14(e) loss causation and on section 10b-5 loss  
6 causation.

7 With regard to his 14(e) opinions, section 14(e)  
8 prohibits fraudulent, deceptive, and manipulative acts in  
9 connection with a tender offer. Where, as here, a tender offer  
10 fails determining what losses to investors were caused by the  
11 tender offer's failure requires evaluation of two things.

12 One, the chances that the tender offer would have been  
13 successful had the information that was allegedly concealed  
14 been known to the market. And two, the price at which the  
15 tender offer would have been completed, if it was completed at  
16 all, in the but-for world.

17 Dr. Nye lacked the expertise necessary to conduct these  
18 analyses. Dr. Nye admitted during his deposition that he is  
19 only, quote, Qualified to assess the definition of a tender  
20 offer and how it relates to the potential change of ownership  
21 which he believed was, quote, pretty straightforward. So he  
22 could testify he said about the definition of a tender offer.  
23 What is a tender offer.

24 But he testified that he, quote, Is not an expert in the  
25 legal and fine-tuned details of tender offers and does not,

1 quote, Get into the weeds on the subject. An expert is  
2 supposed to be getting into the weeds on the subject.

3 He testified that he has never published, taught, or  
4 taken courses on tender offers. No court has ever accepted him  
5 an expert on 14(e) claims. In light of these facts, it is  
6 unsurprising that Dr. Nye fails to identify a methodology to  
7 evaluate whether Mylan would have made the tender offer and, if  
8 so, at what price, if Mylan would have known the purported  
9 truth that defendants supposedly concealed.

10 Let me now turn briefly to Dr. Nye's section 10(b)  
11 analysis. Most significantly, Dr. Nye fails to disaggregate  
12 the effects of confounding information from his events study.  
13 For example, Dr. Nye should have treated the April 2016 news  
14 reports about Mr. Papa's departure to become the CEO of  
15 Valeant, and Mr. Hendrickson's appointment to take Mr. Papa's  
16 place as CEO of Perrigo, as confounding information unrelated  
17 to the fraud rather than as fraud-related information.

18 And on May 12, 2016 and August 10, 2016, the market  
19 learned that Perrigo's over-the-counter business, about which  
20 nothing is alleged in the complaint, Perrigo's over-the-counter  
21 business in the United States -- what's referred to as the CHC  
22 business in some of the papers -- is completely distinct from  
23 the Omega business or from the Rx pharmaceuticals business.

24 Yet on those dates, the company gave negative  
25 information about the over-the-counter CHC business, in

1 addition to the negative information about those other topics,  
2 and yet Dr. Nye -- as was alluded to by Mr. Harrod before --  
3 assumes that the entirety of the price -- of the stock drop was  
4 due to the information that they allege in their complaint, and  
5 that none of it was due to the information about the CHC  
6 business. But under well-accepted methodology that even their  
7 expert accepts, he supposed to disaggregate the different  
8 factors.

9 Let me now turn very, very briefly to Mr. Clark.

10 Mr. Clark is the plaintiff's expert with regard to the  
11 Rx pricing. The fundamental reason why Mr. Clark's methodology  
12 is unreliable is that he fails to take into account that the  
13 markets for the drugs at issue are oligopolistic. During his  
14 deposition, Mr. Clark belatedly admitted that these markets are  
15 oligopolistic. Yet in his reports, Mr. Clark did not account  
16 for that fact. We're not saying, as the plaintiffs say in  
17 their papers, that he had to do a certain type of analysis.

18 We're saying that his failure to take into account the  
19 oligopolistic nature of the markets means that his methodology  
20 is just wrong.

21 He stated during his deposition, in trying to explain  
22 why he doesn't talk about oligopoly in his opening report at  
23 all, that he, quote, doesn't think it comes into play. But as  
24 Mr. Wareham discussed earlier, the Third Circuit has repeatedly  
25 made clear that whether a market is oligopolistic not only

1 comes into play, but it a critical factor in determining  
2 whether parallel price increases suggest collusion.

3 As Mr. Wareham explained in the *Valspar*, *Chocolate*, and  
4 *Baby Foods* cases, the Third Circuit has specifically rejected  
5 antitrust claims premised on parallel-pricing theory in  
6 oligopolistic markets. That is because as the Third Circuit  
7 held in *Valspar*, parallel pricing can only demonstrate price  
8 fixing in cases involving non-oligopolistic markets.

9 Mr. Clark's failure to take into account that the  
10 markets at issue here are oligopolistic means his methodology  
11 is unreliable. For example, Mr. Clark stated in his opening  
12 report that because for most of the studied drugs, quote,  
13 Competitors maintained actual pricing that was highly  
14 correlated for a substantial period following a large price  
15 increase that, quote, Such pricing suggests collusion; or at  
16 least the absence of vigorous price competition.

17 But the whole point is that highly correlated pricing  
18 for a substantial period of time is the parallel pricing that  
19 *Valspar* and all of the Third Circuit cases have said does not  
20 show collusion. So the fact that he is not in an oligopolistic  
21 market -- so the fact that Mr. Clark thinks it does show  
22 collusion and thinks that the fact it is an oligopolistic  
23 market does not come into play shows that his methodology is at  
24 odds with the way the Third Circuit thinks about the meaning of  
25 parallel pricing in an oligopolistic market.

1           In *Concord Boat Corporation v. Brunswick Corp.*, the  
2 Eighth Circuit held that an expert's opinion, quote, should not  
3 have been admitted because it did not incorporate all aspects  
4 of the economic reality of the market and because it did not  
5 separate lawful from unlawful conduct. Because of the  
6 deficiencies in the foundation of the opinion, the expert's  
7 resulting conclusions were mere speculation, close quote.

8           Similarly, in *Williamson Oil v. Philip Morris*, the  
9 Eleventh Circuit uphold the exclusion of testimony of an expert  
10 who, like Mr. Clark here, quote, Did not differentiate between  
11 legal and illegal pricing behavior and instead simply grouped  
12 both of these phenomena under the umbrella of illegal  
13 conclusive price fixing. The Court explained in that case, the  
14 Williamson case, that the expert's failure to, quote,  
15 Distinguish conscious parallelism from cartel behavior makes  
16 his subsequent opinion inadmissible as he finds inferences of  
17 collusion where the law finds none. The Court concluded that  
18 because of this failure, the expert's opinions, quote, Could  
19 not have aided a finder of fact to determine whether the  
20 behavior was or was not legal. Similarly, Mr. Clark finds  
21 inferences of collusion where the law finds none.

22           For these reasons as well as the others discussed in our  
23 briefs, the Court should grant the Daubert motions and exclude  
24 the testimony of plaintiff's expert witnesses.

25           Thank you, your Honor.

1 THE COURT: Thank you, Counsel.

2 MR. HARROD: Thank you, your Honor. I'll -- in view  
3 of the time and the Court's extreme patience throughout today,  
4 I will try to be as brief as I can be.

5 I want to recognize from the outset that it should  
6 not -- we have many disagreements with the defendants' experts,  
7 as we do on the merits of the case. We also respect that the  
8 bar for both summary judgment and for excluding experts under  
9 Daubert is very high. So we should not be misread as to  
10 believing that we are ceding to any of the positions that they  
11 espouse either on the merits or with respect to the expert  
12 testimony.

13 So with that, I want to talk about the fact that the  
14 defendants' identify purportedly, with respect to three of the  
15 experts, methodological flaws that make their testimony  
16 unreliable, but admissibility under Rule 702 does not require  
17 that a Court agree with an expert or find her opinion's  
18 convincing. It boils down to three requirements, that is  
19 qualification, reliability and fit. They only challenge  
20 qualification as to Dr. Nye. They challenged reliability as to  
21 all three, and I don't believe the challenge fit as to any of  
22 them.

23 And, largely, as on the merits of the summary judgment  
24 motions, these reflect disagreements with our experts'  
25 conclusions and to a lesser extent, they manifest as criticisms



1 of their methodologies.

2 But defendants' challenges are actually inconsistent  
3 with the Court here exercising the gatekeeping function to  
4 preclude offering these parties to the jury. Reliability does  
5 not require that expert opinion be supported by the best  
6 foundation, methodology, or research. That is from the  
7 *Wojciechowski* case, and the reliability standard requires that  
8 the experts' opinions rest on good grounds. Experts are  
9 granted wide latitude in determining what data is needed to  
10 reach a conclusion. These are all authorities that are cited  
11 in our briefs.

12 At this stage, the Court's role is not to determine  
13 whether the testimony is correct but only whether it falls  
14 outside the range where experts might reasonably differ. So  
15 the disagreements here don't reach that standard.

16 I'm going to start with Mr. Purcell.

17 He is an investment banker. He is offering the  
18 perspective of his profession on the structure and process of  
19 Perrigo's response and its opposition to Mylan's hostile tender  
20 offer and the importance of information related to plaintiff's  
21 allegations, the importance of the information that was  
22 provided to the investors in light of plaintiff's allegations.  
23 Those are complicated issues of disclosures and financial  
24 markets and a corporate transaction spanning a period of, I  
25 think, seven months or six months. The jurors will undoubtedly

1 benefit from Mr. Purcell's 50 years of experience in these  
2 matters and in describing why an investor would have looked at  
3 this information and what about that information would have  
4 been important.

5 Mr. Groner identified a few cases where Mr. Purcell had  
6 been excluded, but as we put forth in his CV, he was -- he's  
7 testified in over 200 cases. He served as an expert for both  
8 the Securities Exchange Commission and Department of Justice.  
9 His testimony here is reliable, and it fits the issues in the  
10 case.

11 The defendants concerns really here go to the weight  
12 or -- the weight of the evidence that's to be provided by  
13 Mr. Purcell, and he is not -- and I want to reiterate this and  
14 I will get into the specifics of the points that they touched  
15 on, he is not providing opinions on legal issues of materiality  
16 or conclusions regarding the state of mind of the defendants.  
17 He will not instruct the jury. Only your Honor will be able to  
18 instruct the jury in this case. Therefore, there is no basis  
19 to exclude Purcell's proffered opinions, which, as I said  
20 before, will be really helpful to the jury.

21 Regarding state of mind, Mr. Purcell is not testifying  
22 about the suggestive state of mind of any defendant. He is  
23 simply indicating -- and they criticize him for using the word  
24 known, and he is using that in the colloquial sense of this  
25 person received information and it was in their possession.

1 They knew it. He is not using that word as a basis for a legal  
2 conclusion as to someone's scienter, which, obviously, relates  
3 to their knowledge of facts that were misrepresented or hidden.

4 This kind of testimony is appropriate, and he is not,  
5 you know, he is not reaching a legal conclusion.

6 With respect to falsity, Purcell's purported testimony  
7 assumes that plaintiffs will establish falsely and the  
8 defendants statements were false and misleading. That is not  
9 his conclusion; that's an assumption. He is offering an  
10 opinion on the importance of that information to investors.  
11 Regarding disclosure standards, Mr. Purcell is not offering a  
12 legal definition or conclusion regarding those standards. His  
13 full disclosure standard is one of industry ethics. It's from  
14 the Library of Investment Banking, which is cited at Exhibit  
15 138 at page 35.

16 He is describing the financial and investment importance  
17 of the information at issue. This is totally proper. Experts  
18 may opine on industry standards in their application of the  
19 facts. That is from the *Reilly v. Vivint Solar* case. We cite  
20 additional -- that case and additional cases in our opposition  
21 at page 114.

22 Given these considerations and the ability to limit  
23 Purcell's testimony to the extent it is necessary and for the  
24 Court to instruct the jury at trial, there is absolutely no  
25 basis to exclude his opinions under -- as unreliable under the

1 Daubert standard.

2 Moving on to Dr. Nye, we have offered Dr. Nye as an  
3 expert on loss causation and damages. He is -- just to talk  
4 about his qualifications -- because they have apparently come  
5 under scrutiny here -- he is an Ivy League-educated PhD  
6 economist. His academic and research credentials are  
7 unsalable, at least until today, and he has been accepted as an  
8 expert in similar cases to offer similar testimony many times  
9 over.

10 Defendants limited challenge to Dr. Nye's qualification  
11 concern only his opinions on the tender offer. In our brief we  
12 cite, at 97, several cases showing Dr. Nye's qualifications  
13 here are adequate, in particular, because Dr. Nye possesses the  
14 skill or knowledge that is far greater than the average layman.

15 He is not opining that -- their criticism of him largely  
16 stems from the idea that he is not an expert in the legal  
17 mechanisms of tender offers. That's -- first of all, he is  
18 not. I'm not sure that that is an appropriate province for an  
19 expert to opine on anyway because those would be legal issues,  
20 and he is not opining on them.

21 He is opining on the subject of the economic impact of  
22 the tender offer and the causation, the likelihood that the  
23 tender offer would have been accepted in the absence of  
24 defendants' misrepresentations.

25 As an economist who studies public markets and looks at

1 cause and effect of information that reaches public markets and  
2 measuring that effect, Dr. Nye is undoubtedly qualified to  
3 testify on these subjects.

4 The fact that they only challenge him with respect to  
5 the tender offer based on the fact that he is not a person who  
6 says I am an expert in the legal structure of tender offers  
7 should be rejected.

8 Going to the reliability of his analysis under 14(a),  
9 they criticize him, essentially, for what I think is a  
10 disagreement between the parties in this case, and I think the  
11 plaintiffs obviously have the better argument, but I think at  
12 the end of the day what he is doing on the 14(e) claim is an  
13 analysis, that in the absence of the misrepresentations, the  
14 tender offer would have gone forward.

15 We set forth in our brief that Dr. Nye's 14(e) analysis  
16 builds upon the 10(b) analysis in this case, meaning that there  
17 were misrepresentations that were made to the investors, and he  
18 looked at very specific analyses to come to the conclusion that  
19 in the absence of the misreps the tender offer would have gone  
20 through. He looks at the number of share s that were tendered.  
21 He looks at the number of the shares that are now seeking a  
22 remedy based on the misrepresentations in connection with the  
23 tender offer, concludes that that amount of shares exceeds the  
24 50 percent threshold and the tender offer would have gone  
25 through. He looks at analyst reports and commentary, and he

1 concludes, based on that and the fact that he finds that the  
2 consideration to be paid in the tender offer, provided an  
3 immediate economic benefit, that all of those things are  
4 sufficient to reach the conclusion that the tender offer would  
5 have gone through in the absence of the fraud. And so then he  
6 calculates on a nonspeculative basis how one would measure the  
7 damages there.

8           On the 10(b) side there are criticism -- and I talked  
9 about this in our argument about loss causation, so I will try  
10 not to repeat anything that I have said -- is, basically, that  
11 he doesn't disaggregate, that they say that there is this  
12 confounding unrelated information. Mr. Groner talked about the  
13 CHC Division, the over-the-counter division of Perrigo.

14           He didn't -- I think the words that were used is he  
15 assumes that that didn't affect the stock price. That is not  
16 true.

17           If you look at Dr. Nye's reports, he doesn't assume at  
18 all. He looks at the public information that is out there  
19 about the company, what the company said, what securities  
20 analysts who follow the company said, what news reports say.  
21 And he looks at that and says, I'm a professional economist.  
22 I'm going to look at this, and I can try to interpolate from  
23 that information what factors, what information that reached  
24 the market on a particular day changed the price of the stock.

25           For that day that they were talking about and the other

1 days they were talking about, it is not that he doesn't -- that  
2 he assumed he doesn't have to disaggregate. He reaches the  
3 conclusion based on that analytical process that he does not  
4 need to. So the idea that he should be excluded under Daubert  
5 for that has to be rejected.

6 Finally, I am going to touch on Mr. Clark for a few  
7 minutes.

8 The primary challenge that we heard about today is that  
9 he doesn't take properly into account the fact that the  
10 defendants have posited that Perrigo's generics business  
11 operated in an oligopolistic market. Whatever the analytical  
12 conclusions that are reached for that should not govern the  
13 process of whether or not his analysis and his conclusions are  
14 reliable because they are -- and, in fact, we would pose that  
15 Mr. Clark actually did consider and he did consider the fact  
16 that Perrigo's generics business operated in an oligopolistic  
17 market.

18 First of all, we need to be clear that the defendants  
19 themselves never described the market that they were operating  
20 in as a premise for what Mr. Clark was doing as an oligopoly.  
21 They never characterized that in any way.

22 They characterized it as competitive. They said the  
23 pricing would be flat to slightly up, which we have talked  
24 about that ad nauseam. I won't belabor it anymore, but while  
25 Mr. Clark does not use the term oligopolistic in his initial

1 report, his analysis concludes that the features of the market  
2 for generic topicals that we are talking about in this case  
3 are, in fact, the same ones that their experts and they point  
4 to as reflecting an oligopoly. He says -- and his report is  
5 Exhibit 102. This is at page 5 of his report -- the market for  
6 generic drugs and, in particular, topical generic drugs  
7 contains several structural elements that makes it conducive to  
8 anticompetitive behavior, including highly concentrated  
9 markets, pricing elasticity, fungible products among  
10 competitors, informal and formal mechanisms for dissemination  
11 of pricing in market share information among competitors.  
12 These are among the same characteristics that they say make the  
13 market for these products oligopolistic.

14           Moreover, Clark did specifically consider the market  
15 report in his reply. And even when considering the defendants,  
16 what defendants referred to as oligopoly concluded that the  
17 evidence here demonstrates substantial indicia of collusion --

18                               (Reporter clarification.)

19           MR. HARROD: So what he looked at there is he is  
20 basically saying, I accept that you may have an oligopoly here.  
21 I look at your pricing behavior and what happened with your  
22 products, and the oligopoly does not explain that.

23           So he took into account the thing that the defendants  
24 say he did not. He looks at including -- the evidence that he  
25 points to showed that the features -- or the actions that



1 Perrigo took are not explained by oligopoly include -- these  
2 are just a few examples -- that Sandoz, for one, admitted to  
3 engaging in anticompetitive conduct with Perrigo, including  
4 rigging bids and fixing prices. So that's one piece of  
5 evidence that exists in support of the conclusion that the  
6 behavior is not just explained by oligopoly.

7         Second one, evidence that Perrigo declined customer  
8 business or declined to bid for business to appease a  
9 competitor or to avoid taking market share, so that is the kind  
10 of behavior that exists in addition to an oligopoly that  
11 Perrigo engaged in. And despite -- and this is something that  
12 Mr. Silverman talked about. He looked at other markets where  
13 there were oligopolistic features, ophthalmic and injectable  
14 generic drugs also exhibit the same type of features the  
15 defendants point to. Those markets did not experience the same  
16 type of pricing actions and changes as did generic prices that,  
17 you know, Perrigo and its competitors were engaged in.

18         So I just want to make one point. The defendants'  
19 expert on the subject, Dr. -- I think he's a doctor --  
20 Dr. Lackdawalla, he doesn't talk about Perrigo's public  
21 statements. He doesn't look at the record evidence. He  
22 doesn't talk about their actual practices.

23         He creates, basically, a spherical, you know, completely  
24 sterile universe where he can examine a lot of these features  
25 in an environment that doesn't include the evidence.

1 Dr. Clark's reports talk a lot about things that Perrigo  
2 did. He looks at the record, emails, deposition testimony, and  
3 analyzes that. Their expert does not do that.

4 So I feel like, if anything, Dr. Clark's report and  
5 conclusions are highly reliable and, in fact, more reliable  
6 than the defendants' expert.

7 The fact that Dr. Clark disagrees with their conclusions  
8 is not a basis to exclude him under Daubert. They talked about  
9 the *Williamson* case. And here the difference is, and we --  
10 here Clark addresses the market structure, as I said, including  
11 that it has these oligopolistic features, which is the  
12 criticism in *Williamson*, and concludes that those structural  
13 features cannot explain the price changes.

14 Your Honor, I'm going to go back to counsel table.

15 I thank you very much for listening all day today and to  
16 the courtroom staff for bearing with us.

17 Thank you.

18 THE COURT: Thank you, Counsel.

19 MR. WAREHAM: Your Honor, one last thing, if I may?

20 THE COURT: One last thing.

21 MR. WAREHAM: I want to thank the Court for your  
22 courtesy and indulgence, and I want to thank your staff for all  
23 the help with the equipment, all the patience. I certainly  
24 want to thank the court deputy and probably most importantly, I  
25 want to thank the court reporter because there are lot of fast

1 talkers here, and it's been really quite a pleasure to be here.

2 Thank you all very much.

3 THE COURT: Counsel, thank you both, also, for your  
4 cooperation because I understand with the transition. This is  
5 a quite old case and justice delayed is justice denied, as my  
6 judge used today tell me when I clerked a million years ago.  
7 So we're going to endeavor to try and get this decision out to  
8 you as soon as possible.

9 But I do want to commend you on the argument because you  
10 were able to synthesize 152 pages of facts and thousands of  
11 pages of documents and, basically, aid us to point us in the  
12 right direction in terms of how to decide this.

13 I do remember my days on the other side over there as  
14 well, so I appreciate your efforts, and thank you.

15 MR. SILVERMAN: Thank you, your Honor.

16 THE COURTROOM DEPUTY: All rise.

17 (Whereupon the proceedings are adjourned at 4:43 p.m.)

18 \* \* \*

19 FEDERAL OFFICIAL COURT REPORTER'S CERTIFICATE

20

21 I certify that the foregoing is a correct transcript  
22 from the record of proceedings in the above-entitled matter.

23

24 /S/ Melissa A. Mormile RDR, CCR, CRCR

4/7/2022

25 Official Court Reporter

Date

<b>\$</b>	111:25, 178:1, 195:5 <b>10b5-1</b> [4] - 69:25, 71:7, 71:15, 174:19 <b>10K</b> [1] - 84:8 <b>10KT</b> [1] - 84:10 <b>10Q</b> [1] - 84:8 <b>10th</b> [1] - 158:20 <b>11</b> [8] - 25:3, 25:24, 25:25, 26:11, 26:20, 100:23, 175:24, 181:3 <b>11,000</b> [1] - 71:3 <b>11,490</b> [1] - 71:4 <b>110</b> [1] - 107:13 <b>114</b> [1] - 203:21 <b>116</b> [1] - 116:2 <b>11:03</b> [1] - 5:3 <b>12</b> [13] - 25:3, 25:24, 25:25, 26:12, 74:6, 80:5, 102:10, 103:16, 128:25, 132:11, 181:4, 186:3, 196:18 <b>120</b> [3] - 95:16, 115:10, 115:14 <b>124</b> [1] - 129:1 <b>125</b> [1] - 3:4 <b>1251</b> [1] - 2:8 <b>12:26</b> [1] - 94:2 <b>12:27</b> [1] - 94:10 <b>12th</b> [3] - 61:5, 61:9, 158:20 <b>13</b> [11] - 71:5, 71:25, 84:9, 107:7, 113:1, 132:17, 141:17, 141:19, 142:11, 170:3, 186:3 <b>13,000</b> [1] - 67:2 <b>13.6</b> [1] - 99:16 <b>138</b> [1] - 203:15 <b>139</b> [1] - 4:8 <b>13th</b> [2] - 78:18, 142:8 <b>14</b> [8] - 46:1, 76:20, 76:21, 76:22, 87:23, 104:8, 169:16, 186:4 <b>14(a)</b> [1] - 205:8 <b>14(e)</b> [30] - 43:19, 43:23, 44:16, 44:17, 47:4, 47:16, 47:22, 47:24, 48:2, 139:11, 139:17, 140:4, 140:5, 178:4, 178:11, 178:14, 178:19, 179:12, 189:14, 189:16, 189:18, 189:25, 190:5, 195:5, 195:7, 196:5, 205:12, 205:15 <b>14(e)</b> [3] - 8:15,	111:25, 143:15 <b>14,000-page</b> [1] - 94:23 <b>140,000</b> [1] - 123:14 <b>1400</b> [1] - 34:3 <b>14th</b> [1] - 170:1 <b>15</b> [4] - 55:25, 72:20, 105:17, 132:17 <b>150</b> [2] - 34:4, 144:3 <b>152</b> [1] - 211:10 <b>158</b> [2] - 121:11, 124:20 <b>15th</b> [1] - 10:25 <b>16</b> [3] - 73:2, 73:9, 123:4 <b>160</b> [2] - 127:2, 135:18 <b>161</b> [2] - 4:5, 115:21 <b>162</b> [1] - 98:13 <b>164</b> [1] - 99:6 <b>166</b> [3] - 4:6, 122:16, 134:16 <b>167</b> [2] - 107:4, 122:16 <b>169</b> [1] - 107:13 <b>17</b> [4] - 91:2, 151:1, 151:5, 151:11 <b>17.7</b> [1] - 156:25 <b>170</b> [1] - 122:16 <b>171</b> [1] - 134:7 <b>172</b> [1] - 124:24 <b>174</b> [1] - 178:5 <b>175</b> [1] - 4:4 <b>17th</b> [3] - 29:14, 91:7, 100:3 <b>17TH</b> [1] - 2:17 <b>18</b> [5] - 68:18, 75:2, 100:24, 106:1, 156:25 <b>180</b> [2] - 101:2, 187:20 <b>181</b> [2] - 108:22, 109:4 <b>182</b> [2] - 4:7, 105:25 <b>183</b> [2] - 113:8, 132:20 <b>18448</b> [1] - 110:9 <b>188</b> [1] - 4:8 <b>189</b> [2] - 39:15, 39:17 <b>18th</b> [4] - 106:1, 151:23, 153:1, 153:25 <b>19</b> [6] - 53:7, 75:10, 75:22, 75:23, 76:8, 106:15 <b>191</b> [1] - 4:11 <b>192</b> [1] - 99:10 <b>195</b> [2] - 102:24, 187:21 <b>196</b> [1] - 107:12 <b>197</b> [1] - 187:25 <b>199</b> [1] - 4:12 <b>1999</b> [1] - 12:15 <b>19th</b> [1] - 89:18	<b>1:30</b> [1] - 94:10 <b>2</b> <b>2</b> [9] - 17:8, 63:23, 63:24, 80:10, 80:14, 96:1, 96:4, 167:18 <b>2.3</b> [1] - 141:15 <b>20</b> [4] - 77:11, 92:17, 103:5, 175:5 <b>20,000</b> [1] - 123:14 <b>200</b> [3] - 2:21, 97:21, 202:7 <b>2000</b> [1] - 45:19 <b>20006</b> [1] - 2:17 <b>2003</b> [1] - 147:10 <b>2005</b> [1] - 110:9 <b>2006</b> [1] - 66:24 <b>2008</b> [2] - 192:8, 192:12 <b>2010</b> [3] - 17:5, 25:3, 112:13 <b>2011</b> [3] - 17:5, 25:3, 148:25 <b>2012</b> [1] - 115:2 <b>2013</b> [5] - 74:12, 76:8, 112:13, 112:15, 126:24 <b>2014</b> [13] - 29:5, 74:6, 74:12, 76:8, 85:23, 98:3, 98:10, 108:25, 121:13, 121:15, 121:18, 131:25, 132:11 <b>2015</b> [88] - 10:11, 11:1, 35:15, 36:2, 36:21, 37:15, 38:3, 38:14, 45:20, 55:25, 59:1, 59:14, 60:4, 60:6, 60:20, 69:24, 70:9, 70:12, 70:25, 71:5, 79:25, 80:5, 80:10, 80:14, 84:7, 84:8, 84:9, 85:1, 85:11, 86:12, 87:9, 87:23, 91:2, 92:8, 92:13, 96:14, 98:11, 98:24, 99:13, 99:15, 99:22, 100:24, 102:10, 103:5, 103:16, 103:24, 104:8, 105:5, 105:17, 106:1, 106:5, 106:15, 107:7, 107:17, 108:2, 112:13, 112:15, 113:1, 113:6, 113:13, 113:15, 113:17, 114:17, 128:25, 130:19,	131:8, 132:17, 132:19, 132:21, 132:22, 133:14, 141:17, 141:19, 142:11, 146:15, 151:24, 169:16, 170:3, 174:3, 178:20, 179:9, 187:9, 187:10, 187:17, 190:7, 190:11 <b>2016</b> [26] - 23:19, 36:3, 38:13, 48:11, 48:24, 60:7, 66:24, 67:10, 80:21, 84:10, 88:8, 104:3, 113:7, 113:11, 151:12, 151:23, 156:8, 156:14, 156:16, 158:20, 165:6, 174:3, 190:6, 196:13, 196:18 <b>2017</b> [3] - 158:21, 158:24 <b>2018</b> [7] - 14:18, 24:25, 29:24, 35:16, 39:5, 68:19, 176:2 <b>2019</b> [3] - 29:13, 39:16, 175:24 <b>2020</b> [2] - 29:13, 88:24 <b>2021</b> [4] - 38:1, 43:2, 43:4, 58:9 <b>2022</b> [4] - 1:12, 26:14, 186:2, 186:4 <b>206</b> [2] - 102:4, 124:25 <b>2081859</b> [1] - 39:5 <b>20A</b> [1] - 8:17 <b>20th</b> [1] - 106:17 <b>21</b> [7] - 36:2, 37:15, 57:15, 57:16, 71:9, 77:20, 85:1 <b>212</b> [1] - 102:13 <b>213</b> [3] - 103:8, 106:4, 106:13 <b>216</b> [1] - 106:19 <b>218</b> [1] - 39:15 <b>21st</b> [3] - 89:20, 154:4, 158:6 <b>22</b> [10] - 37:14, 48:11, 48:23, 55:25, 78:4, 85:3, 89:3, 119:24, 131:8, 172:5 <b>22nd</b> [5] - 56:7, 61:21, 62:2, 63:21, 126:24 <b>23</b> [7] - 24:25, 60:4, 60:6, 78:17, 87:15, 99:22, 108:16 <b>231</b> [1] - 116:17 <b>236</b> [1] - 138:14 <b>238</b> [1] - 105:20
<b>/</b>				
<b>/S</b> [1] - 211:24				
<b>0</b>				
<b>07068</b> [1] - 1:19 <b>07095</b> [1] - 2:12 <b>07101</b> [1] - 1:11 <b>0764</b> [1] - 39:17				
<b>1</b>				
<b>1</b> [4] - 136:19, 178:18, 183:16, 184:3 <b>1.09</b> [1] - 29:4 <b>10</b> [9] - 26:20, 38:1, 45:24, 60:7, 87:9, 146:15, 152:15, 175:4, 196:18 <b>10(b)</b> [4] - 147:25, 196:10, 205:16, 206:8 <b>10,900</b> [1] - 66:25 <b>100</b> [4] - 49:23, 124:22, 127:17, 142:10 <b>100,000</b> [1] - 137:4 <b>10004</b> [1] - 3:4 <b>10016</b> [1] - 2:4 <b>10020</b> [1] - 2:9 <b>10166</b> [1] - 2:22 <b>102</b> [3] - 121:10, 125:14, 208:5 <b>107</b> [1] - 107:13 <b>10:03</b> [1] - 1:12 <b>10:25</b> [1] - 159:9 <b>10b-5</b> [11] - 8:4, 8:15, 47:24, 48:1, 48:10, 49:2, 55:4, 56:17,				

<p><b>23rd</b> [9] - 60:11, 60:17, 61:12, 63:19, 103:13, 126:24, 165:4, 165:7, 165:14</p> <p><b>24</b> [3] - 45:19, 45:20, 79:15</p> <p><b>241</b> [3] - 113:17, 130:19, 132:22</p> <p><b>242</b> [2] - 113:12, 132:20</p> <p><b>243</b> [2] - 114:15, 132:23</p> <p><b>244</b> [2] - 114:15, 132:23</p> <p><b>245</b> [2] - 113:15, 132:22</p> <p><b>246</b> [2] - 114:15, 132:23</p> <p><b>25</b> [5] - 70:25, 71:11, 84:9, 151:12, 156:8</p> <p><b>253</b> [1] - 121:22</p> <p><b>259</b> [1] - 97:22</p> <p><b>25th</b> [3] - 156:13, 158:9, 158:13</p> <p><b>26</b> [2] - 80:14, 88:8</p> <p><b>269</b> [1] - 127:15</p> <p><b>27</b> [5] - 149:7, 150:9, 171:5, 172:25, 176:2</p> <p><b>271</b> [3] - 73:2, 73:6, 73:9</p> <p><b>272</b> [3] - 74:4, 132:13</p> <p><b>276</b> [1] - 133:3</p> <p><b>278</b> [1] - 132:8</p> <p><b>27th</b> [1] - 62:10</p> <p><b>28</b> [3] - 11:4, 20:15, 172:25</p> <p><b>284</b> [1] - 127:7</p> <p><b>289</b> [1] - 109:21</p> <p><b>28th</b> [1] - 71:7</p> <p><b>29</b> [3] - 58:8, 84:8, 179:9</p> <p><b>292</b> [2] - 45:20, 137:9</p> <p><b>295</b> [2] - 114:15, 132:23</p> <p><b>299</b> [1] - 107:16</p> <p><b>2:16-cv-02805-JXN-LDW</b> [1] - 1:4</p> <p><b>2nd</b> [4] - 118:14, 159:14, 159:15, 159:21</p>	<p>122:14, 134:10</p> <p><b>30-minute</b> [1] - 92:15</p> <p><b>300</b> [2] - 123:8, 127:24</p> <p><b>309</b> [1] - 104:10</p> <p><b>30th</b> [7] - 57:20, 58:14, 58:15, 60:16, 85:3, 85:20</p> <p><b>31</b> [5] - 83:10, 84:6, 108:16, 123:6, 170:2</p> <p><b>33</b> [1] - 85:2</p> <p><b>334</b> [1] - 118:14</p> <p><b>34</b> [3] - 36:23, 85:10</p> <p><b>35</b> [4] - 85:20, 86:6, 98:20, 203:15</p> <p><b>35-plus</b> [1] - 66:17</p> <p><b>36</b> [2] - 86:6, 146:17</p> <p><b>360</b> [1] - 98:6</p> <p><b>3601229</b> [1] - 68:19</p> <p><b>365</b> [1] - 117:22</p> <p><b>37</b> [3] - 63:21, 87:7, 87:15</p> <p><b>371</b> [1] - 105:12</p> <p><b>38</b> [1] - 87:23</p> <p><b>382</b> [1] - 117:22</p> <p><b>386</b> [3] - 102:16, 169:12, 169:13</p> <p><b>39</b> [2] - 35:13, 88:7</p> <p><b>390</b> [2] - 103:18, 103:23</p> <p><b>397</b> [1] - 105:3</p> <p><b>3:18</b> [2] - 161:15, 161:18</p> <p><b>3:25</b> [1] - 161:15</p> <p><b>3:26</b> [1] - 161:18</p> <p><b>3rd</b> [4] - 159:3, 159:14, 159:15, 159:21</p>	<p><b>49</b> [2] - 91:1, 98:14</p> <p><b>4:43</b> [1] - 211:17</p> <p><b>4s</b> [1] - 107:11</p> <p><b>4th</b> [1] - 38:1</p>	<p><b>5</b></p>	<p><b>5</b> [9] - 36:3, 51:20, 67:24, 79:25, 80:21, 84:7, 103:24, 130:19, 208:5</p> <p><b>5.8</b> [1] - 154:13</p> <p><b>50</b> [13] - 1:11, 4:5, 17:21, 17:24, 91:6, 141:22, 142:2, 143:16, 143:19, 143:21, 202:1, 205:24</p> <p><b>500</b> [2] - 123:8, 181:25</p> <p><b>51</b> [1] - 91:12</p> <p><b>52</b> [1] - 120:8</p> <p><b>53</b> [2] - 99:19, 121:5</p> <p><b>55</b> [9] - 81:3, 81:4, 81:7, 81:8, 81:14, 82:5, 91:25, 171:7, 172:3</p> <p><b>56</b> [3] - 81:4, 96:23, 188:18</p> <p><b>58</b> [1] - 192:3</p> <p><b>59</b> [1] - 192:3</p> <p><b>592</b> [1] - 38:1</p> <p><b>5th</b> [2] - 78:4, 170:14</p>	<p><b>6</b></p>	<p><b>6</b> [3] - 24:18, 99:13, 107:12</p> <p><b>60</b> [4] - 74:12, 101:1, 192:25, 193:17</p> <p><b>600</b> [1] - 2:4</p> <p><b>63</b> [1] - 101:24</p> <p><b>6473</b> [1] - 186:3</p> <p><b>65</b> [2] - 4:6, 95:17</p> <p><b>662</b> [1] - 118:14</p> <p><b>684169</b> [1] - 26:14</p> <p><b>69</b> [1] - 133:12</p>	<p><b>7</b></p>	<p><b>7</b> [3] - 1:12, 4:4, 51:25</p> <p><b>70</b> [2] - 21:18, 63:22</p> <p><b>700</b> [3] - 122:19, 123:8, 127:24</p> <p><b>702</b> [2] - 191:9, 200:16</p> <p><b>703</b> [1] - 117:14</p> <p><b>76</b> [2] - 128:8, 131:10</p>	<p><b>8</b></p>	<p><b>8</b> [4] - 60:20, 69:24,</p>	<p>86:12, 105:5</p> <p><b>8(A)3</b> [1] - 118:4</p> <p><b>80</b> [1] - 126:1</p> <p><b>800</b> [3] - 34:3, 134:21, 163:23</p> <p><b>801</b> [2] - 2:17, 118:2</p> <p><b>803</b> [2] - 118:4, 120:7</p> <p><b>803(8)</b> [4] - 23:10, 23:11, 23:15, 23:21</p> <p><b>803(A)3</b> [1] - 120:14</p> <p><b>83</b> [2] - 99:10, 104:4</p> <p><b>84</b> [1] - 103:4</p> <p><b>842</b> [1] - 116:17</p> <p><b>87</b> [1] - 141:7</p> <p><b>88</b> [1] - 119:25</p> <p><b>8F</b> [1] - 38:1</p> <p><b>8th</b> [3] - 60:21, 61:5, 61:11</p>	<p><b>9</b></p>	<p><b>9</b> [3] - 103:17, 103:20, 151:1</p> <p><b>9.8</b> [1] - 69:12</p> <p><b>9.9</b> [1] - 150:25</p> <p><b>90</b> [3] - 34:5, 77:14, 126:1</p> <p><b>96</b> [2] - 4:7, 125:16</p> <p><b>97</b> [1] - 204:12</p> <p><b>973)776-7710</b> [1] - 1:25</p> <p><b>99</b> [1] - 2:12</p>	<p><b>A</b></p>	<p><b>a.m</b> [2] - 1:12, 5:4</p> <p><b>ability</b> [3] - 37:20, 190:7, 203:22</p> <p><b>able</b> [7] - 91:17, 98:19, 119:9, 122:15, 135:1, 202:17, 211:10</p> <p><b>ably</b> [2] - 9:11, 51:20</p> <p><b>above-entitled</b> [1] - 211:22</p> <p><b>abrupt</b> [4] - 123:1, 123:9, 123:19, 126:17</p> <p><b>absence</b> [10] - 14:12, 31:24, 72:1, 140:10, 144:8, 198:16, 204:23, 205:13, 205:19, 206:5</p> <p><b>absolutely</b> [10] - 39:25, 42:7, 45:3, 68:15, 81:3, 106:21, 108:13, 111:3, 188:14, 203:24</p> <p><b>abundantly</b> [1] - 42:15</p> <p><b>academic</b> [1] - 204:6</p>	<p><b>accept</b> [9] - 104:2, 104:14, 104:15, 114:1, 121:24, 136:5, 184:24, 188:13, 208:20</p> <p><b>acceptable</b> [2] - 190:19, 190:20</p> <p><b>acceptance</b> [1] - 140:11</p> <p><b>accepted</b> [4] - 196:4, 197:6, 204:7, 204:23</p> <p><b>accepts</b> [2] - 27:21, 197:7</p> <p><b>access</b> [1] - 70:1</p> <p><b>accomplish</b> [1] - 65:7</p> <p><b>according</b> [9] - 15:5, 28:6, 62:18, 98:1, 103:8, 103:22, 109:1, 159:8, 187:15</p> <p><b>accordingly</b> [1] - 160:3</p> <p><b>account</b> [10] - 13:22, 49:3, 121:16, 158:8, 197:12, 197:15, 197:18, 198:9, 207:9, 208:23</p> <p><b>accounting</b> [14] - 59:2, 59:6, 59:10, 98:22, 99:1, 101:22, 103:7, 103:9, 104:7, 104:25, 105:14, 106:3, 109:16, 187:12</p> <p><b>accretive</b> [17] - 36:10, 36:12, 36:16, 37:1, 37:3, 37:7, 89:4, 89:14, 89:15, 89:19, 89:22, 89:23, 89:24, 90:7, 103:21, 106:7</p> <p><b>accurate</b> [10] - 27:22, 67:17, 67:18, 67:19, 72:4, 86:7, 91:5, 115:16, 119:21</p> <p><b>accurately</b> [2] - 90:16, 137:7</p> <p><b>accused</b> [3] - 66:13, 93:10, 164:3</p> <p><b>achieve</b> [3] - 135:1, 155:16, 194:21</p> <p><b>achieved</b> [3] - 143:24, 144:25, 183:19</p> <p><b>acknowledge</b> [2] - 38:5, 48:3</p> <p><b>acknowledges</b> [1] - 27:21</p> <p><b>acquire</b> [1] - 91:17</p> <p><b>acquired</b> [3] - 10:10, 170:5, 184:11</p> <p><b>acquisition</b> [12] - 36:10, 36:22, 37:15,</p>
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<p>39:24, 40:2, 41:20, 85:4, 97:18, 137:25, 152:6, 152:10, 154:10</p> <p><b>acquisitions</b> [3] - 109:3, 164:18, 164:20</p> <p><b>act</b> [2] - 67:22, 103:3</p> <p><b>Act</b> [11] - 8:15, 35:21, 35:22, 111:23, 111:24, 137:18, 139:11, 139:18, 145:14, 177:3</p> <p><b>acted</b> [2] - 14:24, 43:10</p> <p><b>acting</b> [1] - 55:17</p> <p><b>ACTION</b> [1] - 1:3</p> <p><b>action</b> [9] - 21:17, 29:10, 30:7, 32:2, 136:20, 136:21, 137:8, 143:12</p> <p><b>actionable</b> [1] - 38:24</p> <p><b>actions</b> [6] - 21:6, 23:4, 52:12, 125:6, 208:25, 209:16</p> <p><b>activities</b> [8] - 16:8, 18:19, 85:6, 85:8, 86:19, 87:11, 87:20, 187:23</p> <p><b>activity</b> [1] - 20:12</p> <p><b>acts</b> [1] - 195:8</p> <p><b>actual</b> [24] - 10:25, 14:25, 15:12, 16:20, 18:8, 19:6, 30:17, 34:19, 43:22, 72:23, 98:8, 108:17, 109:7, 120:21, 120:22, 121:9, 125:11, 128:5, 128:21, 130:13, 138:13, 188:1, 198:13, 209:22</p> <p><b>ad</b> [1] - 207:24</p> <p><b>add</b> [2] - 24:8, 143:15</p> <p><b>added</b> [1] - 86:25</p> <p><b>addition</b> [7] - 36:24, 69:20, 120:21, 143:20, 157:16, 197:1, 209:10</p> <p><b>additional</b> [11] - 71:15, 90:11, 114:15, 115:22, 129:25, 131:21, 136:9, 136:15, 167:22, 203:20</p> <p><b>additionally</b> [4] - 23:21, 108:19, 125:7, 135:15</p> <p><b>address</b> [15] - 7:5, 7:8, 8:7, 19:21, 24:22,</p>	<p>29:1, 59:6, 66:6, 66:22, 79:24, 94:15, 94:17, 116:22, 139:2, 164:8</p> <p><b>addressed</b> [5] - 18:24, 59:7, 61:3, 72:21, 157:6</p> <p><b>addresses</b> [1] - 210:10</p> <p><b>adequate</b> [1] - 204:13</p> <p><b>adequately</b> [2] - 35:25, 37:9</p> <p><b>adjourned</b> [1] - 211:17</p> <p><b>adjust</b> [1] - 6:18</p> <p><b>adjusted</b> [1] - 158:6</p> <p><b>admissibility</b> [3] - 116:20, 191:8, 200:16</p> <p><b>admissible</b> [10] - 9:13, 9:25, 17:6, 18:7, 23:10, 28:15, 116:12, 116:16, 173:14, 179:19</p> <p><b>admission</b> [3] - 115:23, 120:1, 120:18</p> <p><b>admissions</b> [1] - 120:17</p> <p><b>admit</b> [5] - 21:18, 52:13, 116:13, 116:21, 146:23</p> <p><b>admits</b> [1] - 27:21</p> <p><b>admitted</b> [21] - 72:19, 98:12, 104:3, 108:20, 115:3, 118:12, 119:22, 120:14, 120:17, 124:20, 131:12, 134:10, 134:13, 136:1, 165:15, 165:17, 185:13, 195:18, 197:14, 199:3, 209:2</p> <p><b>adopt</b> [7] - 10:18, 42:21, 43:3, 43:4, 43:7, 114:4, 181:14</p> <p><b>adopted</b> [4] - 42:22, 42:23, 108:24, 124:6</p> <p><b>adopting</b> [1] - 128:21</p> <p><b>advance</b> [2] - 102:15, 114:21</p> <p><b>advanced</b> [2] - 14:12, 194:20</p> <p><b>advantage</b> [2] - 13:15, 32:4</p> <p><b>adverbs</b> [1] - 161:25</p> <p><b>adversarial</b> [4] - 22:16, 24:3, 24:8, 179:22</p> <p><b>adversaries</b> [1] -</p>	<p>183:9</p> <p><b>adversary</b> [1] - 30:23</p> <p><b>advice</b> [1] - 111:8</p> <p><b>advised</b> [4] - 75:5, 131:25, 187:25, 194:13</p> <p><b>affairs</b> [1] - 18:25</p> <p><b>affect</b> [1] - 206:15</p> <p><b>affected</b> [1] - 153:3</p> <p><b>affecting</b> [3] - 150:1, 153:7, 153:14</p> <p><b>affects</b> [1] - 148:15</p> <p><b>affidavit</b> [9] - 24:10, 24:13, 24:16, 26:5, 27:13, 27:16, 27:23, 28:1, 115:15</p> <p><b>affidavits</b> [4] - 52:16, 72:20, 72:22, 179:24</p> <p><b>affirmed</b> [3] - 16:2, 19:4, 37:22</p> <p><b>afraid</b> [1] - 153:13</p> <p><b>Afternoon</b> [1] - 94:14</p> <p><b>afternoon</b> [5] - 94:16, 139:6, 190:15, 191:5, 191:6</p> <p><b>AG</b> [16] - 22:23, 22:25, 23:8, 23:9, 23:15, 23:25, 24:7, 24:14, 24:19, 25:7, 26:6, 116:10, 118:16, 120:22, 147:10</p> <p><b>AG's</b> [1] - 120:19</p> <p><b>agencies</b> [1] - 22:19</p> <p><b>agency</b> [1] - 120:3</p> <p><b>aggregate</b> [1] - 123:5</p> <p><b>ago</b> [10] - 25:4, 25:24, 25:25, 26:12, 26:20, 56:12, 60:22, 173:19, 186:1, 211:6</p> <p><b>agree</b> [7] - 52:11, 98:25, 100:25, 126:10, 147:2, 154:12, 200:17</p> <p><b>agreed</b> [15] - 15:9, 33:17, 61:16, 63:3, 93:1, 119:20, 137:5, 137:6, 141:22, 144:2, 144:12, 144:14, 185:3, 185:19</p> <p><b>agreed-upon</b> [1] - 15:9</p> <p><b>agreement</b> [17] - 14:12, 14:25, 15:12, 16:4, 16:23, 27:3, 27:7, 27:19, 29:20, 31:24, 32:10, 52:18, 115:14, 115:16, 115:19, 122:4, 135:20</p>	<p><b>agreements</b> [3] - 27:8, 27:9, 144:17</p> <p><b>agrees</b> [1] - 163:1</p> <p><b>ahead</b> [1] - 76:17</p> <p><b>aid</b> [1] - 211:11</p> <p><b>aided</b> [1] - 199:19</p> <p><b>aids</b> [1] - 56:13</p> <p><b>ailment</b> [1] - 95:19</p> <p><b>aimed</b> [1] - 134:23</p> <p><b>ain't</b> [1] - 29:22</p> <p><b>al</b> [1] - 1:8</p> <p><b>Alan</b> [1] - 6:4</p> <p><b>ALAN</b> [1] - 2:11</p> <p><b>albeit</b> [1] - 133:22</p> <p><b>all-people's</b> [1] - 22:22</p> <p><b>allegation</b> [8] - 11:19, 24:19, 41:5, 41:21, 41:25, 57:9, 72:16, 178:22</p> <p><b>allegations</b> [30] - 9:6, 10:13, 11:19, 19:8, 22:19, 22:24, 23:4, 23:17, 23:18, 25:2, 26:6, 28:25, 37:10, 40:14, 40:25, 41:18, 42:16, 67:25, 68:20, 71:23, 119:20, 120:11, 130:18, 150:11, 159:24, 177:14, 187:4, 190:8, 201:21, 201:22</p> <p><b>allege</b> [11] - 10:20, 33:25, 37:8, 38:2, 66:7, 69:18, 79:19, 111:24, 177:5, 189:6, 197:4</p> <p><b>alleged</b> [30] - 10:4, 25:6, 25:12, 26:6, 26:18, 28:21, 34:20, 35:18, 37:23, 40:10, 40:23, 44:4, 44:8, 48:6, 48:25, 51:2, 51:4, 69:4, 69:18, 72:5, 72:11, 139:12, 148:10, 154:16, 160:2, 160:19, 163:15, 190:12, 196:20</p> <p><b>allegedly</b> [6] - 50:3, 66:8, 69:15, 160:5, 179:13, 195:13</p> <p><b>alleges</b> [2] - 139:17, 176:2</p> <p><b>alleging</b> [3] - 22:19, 72:18, 74:18</p> <p><b>allocate</b> [1] - 96:7</p> <p><b>allocated</b> [2] - 115:3, 135:22</p>	<p><b>allocating</b> [1] - 120:24</p> <p><b>allotted</b> [1] - 7:3</p> <p><b>allow</b> [7] - 38:25, 98:22, 136:11, 145:13, 188:15, 188:17</p> <p><b>allowed</b> [3] - 9:5, 29:25, 147:21</p> <p><b>allowing</b> [2] - 118:23, 136:12</p> <p><b>allows</b> [3] - 23:11, 40:14, 48:5</p> <p><b>alluded</b> [2] - 42:1, 197:2</p> <p><b>alluding</b> [1] - 34:1</p> <p><b>almost</b> [8] - 18:12, 29:13, 65:18, 96:2, 111:4, 156:25, 166:19, 169:4</p> <p><b>alone</b> [5] - 19:1, 20:7, 25:24, 36:17, 56:8</p> <p><b>alter</b> [2] - 110:12, 180:5</p> <p><b>alternate</b> [1] - 129:19</p> <p><b>alternative</b> [1] - 119:6</p> <p><b>altogether</b> [1] - 97:15</p> <p><b>ambiguous</b> [1] - 193:2</p> <p><b>amend</b> [1] - 10:15</p> <p><b>amended</b> [24] - 10:13, 21:18, 25:8, 25:10, 28:24, 29:14, 40:9, 40:23, 41:17, 42:2, 42:14, 43:14, 136:23, 175:23, 176:1, 176:10, 176:11, 176:16, 176:25, 177:15, 182:15, 184:1, 185:9, 185:19</p> <p><b>amendment</b> [1] - 50:8</p> <p><b>America</b> [2] - 18:12, 80:6</p> <p><b>Americas</b> [1] - 2:8</p> <p><b>amorphous</b> [2] - 28:11, 39:13</p> <p><b>amount</b> [9] - 19:9, 95:13, 104:18, 131:13, 138:2, 140:23, 152:25, 180:18, 205:23</p> <p><b>analyses</b> [2] - 195:18, 205:18</p> <p><b>analysis</b> [15] - 103:22, 139:25, 152:23, 154:12, 158:4, 191:12, 196:11, 197:17, 205:8, 205:13, 205:15, 205:16, 207:13, 208:1</p>
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<p><b>analyst</b> [6] - 101:18, 130:9, 152:20, 153:1, 158:10, 205:25</p> <p><b>analysts</b> [6] - 13:11, 130:5, 151:25, 155:11, 157:23, 206:20</p> <p><b>analytical</b> [2] - 207:3, 207:11</p> <p><b>analyze</b> [1] - 40:5</p> <p><b>analyzed</b> [3] - 31:1, 118:22, 155:25</p> <p><b>analyzes</b> [1] - 210:3</p> <p><b>ancient</b> [1] - 17:5</p> <p><b>Andrea</b> [1] - 119:16</p> <p><b>Anklam</b> [1] - 5:25</p> <p><b>ANKLAM</b> [1] - 2:16</p> <p><b>announced</b> [4] - 36:20, 71:13, 156:13, 158:6</p> <p><b>announcement</b> [2] - 152:1, 158:12</p> <p><b>announcements</b> [1] - 44:19</p> <p><b>annual</b> [2] - 84:9, 126:25</p> <p><b>anomalies</b> [2] - 103:8</p> <p><b>answer</b> [14] - 93:20, 109:17, 114:11, 128:10, 138:25, 167:16, 167:17, 168:16, 168:18, 168:24, 170:8, 172:2, 172:15</p> <p><b>answered</b> [2] - 95:15, 95:17</p> <p><b>answers</b> [5] - 77:3, 130:11, 130:14, 167:11, 167:12</p> <p><b>Anthony</b> [1] - 24:11</p> <p><b>anti</b> [2] - 9:18, 22:20</p> <p><b>anti-trust</b> [2] - 9:18, 22:20</p> <p><b>anticipate</b> [3] - 7:6, 185:17, 190:22</p> <p><b>anticipated</b> [2] - 113:4, 127:16</p> <p><b>anticompetitive</b> [3] - 112:12, 208:8, 209:3</p> <p><b>antidumping</b> [1] - 123:23</p> <p><b>antitrust</b> [8] - 12:13, 29:18, 30:8, 117:18, 117:24, 118:1, 159:1, 198:5</p> <p><b>anyhow</b> [1] - 161:23</p> <p><b>anyway</b> [2] - 20:20, 204:19</p> <p><b>apoplectic</b> [1] -</p>	<p>107:25</p> <p><b>appearances</b> [1] - 5:10</p> <p><b>appeared</b> [1] - 55:23</p> <p><b>appease</b> [1] - 209:8</p> <p><b>applicable</b> [2] - 193:21, 194:6</p> <p><b>application</b> [1] - 203:18</p> <p><b>applied</b> [2] - 81:10, 106:14</p> <p><b>apply</b> [3] - 43:9, 96:24, 149:3</p> <p><b>applying</b> [1] - 128:4</p> <p><b>appointment</b> [1] - 196:15</p> <p><b>appreciate</b> [2] - 190:14, 211:14</p> <p><b>approach</b> [6] - 35:1, 61:13, 80:7, 80:10, 80:11, 192:8</p> <p><b>approaching</b> [1] - 11:16</p> <p><b>appropriate</b> [9] - 24:3, 65:24, 70:23, 75:13, 147:5, 193:13, 194:5, 203:4, 204:18</p> <p><b>approval</b> [2] - 13:8, 78:1</p> <p><b>approved</b> [4] - 98:2, 113:10, 132:25, 185:12</p> <p><b>approving</b> [1] - 134:5</p> <p><b>April</b> [26] - 1:12, 36:2, 37:15, 45:19, 45:20, 48:11, 48:23, 66:24, 70:12, 84:8, 85:1, 85:18, 86:12, 87:9, 87:23, 89:18, 89:20, 104:11, 113:1, 132:17, 151:12, 154:4, 156:8, 156:13, 158:13, 196:13</p> <p><b>Arbitrages</b> [1] - 60:12</p> <p><b>area</b> [4] - 88:15, 153:10, 159:1, 189:14</p> <p><b>argue</b> [13] - 16:13, 28:13, 36:25, 55:6, 81:14, 120:5, 125:4, 128:1, 129:19, 136:3, 140:4, 154:15, 161:13</p> <p><b>argues</b> [2] - 129:9, 153:20</p> <p><b>arguing</b> [3] - 163:12, 183:7, 184:13</p> <p><b>ARGUMENT</b> [2] - 1:5, 4:2</p>	<p><b>argument</b> [33] - 7:3, 15:10, 17:19, 20:11, 24:9, 43:15, 45:10, 45:11, 55:13, 58:4, 90:8, 128:17, 139:10, 147:23, 155:19, 158:22, 160:12, 161:2, 161:11, 164:10, 165:3, 177:7, 177:23, 177:24, 179:20, 183:6, 184:23, 190:13, 205:11, 206:9, 211:9</p> <p><b>arguments</b> [10] - 32:21, 148:16, 156:9, 156:11, 157:3, 158:19, 160:11, 164:25, 165:3, 183:11</p> <p><b>arising</b> [1] - 39:23</p> <p><b>arithmetic</b> [2] - 142:24, 142:25</p> <p><b>Arleo</b> [21] - 9:5, 9:11, 14:17, 35:17, 38:25, 39:10, 40:13, 40:17, 42:2, 50:7, 104:13, 130:7, 133:5, 137:6, 140:13, 157:7, 162:14, 177:10, 184:2, 185:3, 186:19</p> <p><b>Arleo's</b> [2] - 29:24, 30:8</p> <p><b>arrival</b> [3] - 12:19, 43:20, 47:5</p> <p><b>ascribed</b> [1] - 119:20</p> <p><b>aside</b> [3] - 76:6, 84:5</p> <p><b>aspect</b> [1] - 153:10</p> <p><b>aspects</b> [4] - 38:6, 49:4, 49:6, 199:3</p> <p><b>aspirational</b> [1] - 109:6</p> <p><b>assert</b> [2] - 32:8, 111:15</p> <p><b>assertion</b> [2] - 11:23, 186:5</p> <p><b>assertions</b> [2] - 67:25, 185:21</p> <p><b>asserts</b> [2] - 24:13, 100:23</p> <p><b>assess</b> [2] - 83:16, 195:19</p> <p><b>assessed</b> [1] - 97:10</p> <p><b>assessing</b> [2] - 51:11, 95:20</p> <p><b>assessment</b> [2] - 140:2, 157:9</p> <p><b>asset</b> [1] - 152:5</p> <p><b>assets</b> [2] - 152:2, 152:14</p>	<p><b>assist</b> [1] - 95:1</p> <p><b>assistance</b> [1] - 8:1</p> <p><b>associate</b> [2] - 20:22, 20:25</p> <p><b>associated</b> [4] - 46:20, 154:25, 155:1, 170:4</p> <p><b>associates</b> [1] - 49:19</p> <p><b>association</b> [1] - 16:12</p> <p><b>assume</b> [7] - 44:17, 72:2, 163:23, 169:24, 172:6, 206:17</p> <p><b>assumed</b> [1] - 207:2</p> <p><b>assumes</b> [4] - 145:6, 197:3, 203:7, 206:15</p> <p><b>assuming</b> [2] - 72:4, 76:6</p> <p><b>assumption</b> [2] - 145:11, 203:9</p> <p><b>assumptions</b> [2] - 105:2, 192:13</p> <p><b>astounded</b> [1] - 107:2</p> <p><b>astronomical</b> [2] - 56:13, 161:25</p> <p><b>attach</b> [1] - 161:25</p> <p><b>attached</b> [1] - 27:19</p> <p><b>attachment</b> [1] - 132:9</p> <p><b>attacking</b> [1] - 61:2</p> <p><b>attempt</b> [6] - 22:18, 26:5, 33:5, 60:13, 167:17, 186:17</p> <p><b>attempting</b> [1] - 192:11</p> <p><b>attempts</b> [4] - 35:8, 95:2, 181:6, 188:4</p> <p><b>attend</b> [1] - 75:21</p> <p><b>attendance</b> [2] - 16:11, 135:24</p> <p><b>attended</b> [8] - 17:20, 62:17, 100:5, 100:19, 103:6, 126:25, 135:15, 173:19</p> <p><b>attention</b> [3] - 20:21, 21:13, 45:7</p> <p><b>attenuated</b> [1] - 111:13</p> <p><b>attenuation</b> [1] - 111:12</p> <p><b>Attorney</b> [2] - 52:12, 52:14</p> <p><b>attorney</b> [10] - 116:6, 117:7, 118:19, 118:22, 119:9, 119:13, 119:18, 119:21, 119:23</p> <p><b>attorney's</b> [1] - 116:4</p> <p><b>attributable</b> [2] -</p>	<p>30:22, 49:24</p> <p><b>attribute</b> [1] - 41:18</p> <p><b>attributed</b> [2] - 24:14, 158:16</p> <p><b>attributes</b> [1] - 42:3</p> <p><b>audience</b> [1] - 82:1</p> <p><b>audit</b> [7] - 103:11, 106:2, 106:17, 106:18, 107:2, 109:15, 187:8</p> <p><b>auditors</b> [3] - 106:9, 106:23, 106:24</p> <p><b>August</b> [12] - 37:25, 43:1, 70:25, 78:4, 84:9, 103:24, 104:10, 130:19, 158:20, 170:3, 170:14, 196:18</p> <p><b>Aurobindo</b> [1] - 115:24</p> <p><b>authorities</b> [2] - 29:19, 201:10</p> <p><b>authority</b> [8] - 25:14, 25:17, 25:19, 26:4, 31:4, 54:1, 72:17, 118:10</p> <p><b>authorized</b> [5] - 23:13, 118:6, 118:18, 118:19, 119:8</p> <p><b>available</b> [5] - 21:22, 38:12, 71:16, 94:7, 140:16</p> <p><b>avalanche</b> [1] - 194:17</p> <p><b>Avenue</b> [4] - 2:4, 2:8, 2:12, 2:21</p> <p><b>avenue</b> [1] - 181:15</p> <p><b>average</b> [1] - 204:14</p> <p><b>avoid</b> [5] - 33:5, 53:19, 84:7, 167:12, 209:9</p> <p><b>avoids</b> [1] - 172:15</p> <p><b>aware</b> [6] - 15:25, 74:15, 77:5, 77:19, 108:21, 179:16</p> <p><b>awareness</b> [2] - 13:25, 73:3</p>
<b>B</b>				
<p><b>B-O-O-T-H-E</b> [1] - 25:22</p> <p><b>babble</b> [1] - 177:19</p> <p><b>Baby</b> [10] - 11:11, 12:15, 12:18, 14:1, 16:2, 19:19, 21:8, 122:23, 182:6, 198:4</p> <p><b>backed</b> [1] - 65:22</p> <p><b>background</b> [1] - 66:1</p> <p><b>backs</b> [1] - 37:4</p> <p><b>bad</b> [4] - 37:24, 156:18, 164:3, 188:1</p>				

<p><b>ball</b> [2] - 127:18, 146:16</p> <p><b>Bank</b> [2] - 19:1, 80:5</p> <p><b>banker</b> [3] - 97:23, 144:7, 201:17</p> <p><b>Banking</b> [1] - 203:14</p> <p><b>banking</b> [1] - 191:23</p> <p><b>bar</b> [3] - 9:7, 47:18, 200:8</p> <p><b>Barbara</b> [5] - 61:7, 61:8, 61:10, 86:15, 86:16</p> <p><b>bare</b> [2] - 45:3, 67:25</p> <p><b>barely</b> [8] - 9:5, 38:25, 40:12, 40:15, 76:11, 182:9, 182:10</p> <p><b>barriers</b> [2] - 13:3, 13:14</p> <p><b>base</b> [1] - 58:7</p> <p><b>based</b> [23] - 12:13, 17:17, 32:5, 35:22, 42:10, 56:4, 57:19, 65:21, 77:22, 95:13, 127:9, 140:15, 141:15, 145:2, 147:17, 149:20, 159:8, 178:22, 178:23, 205:5, 205:22, 206:1, 207:3</p> <p><b>baseline</b> [2] - 97:24, 98:8</p> <p><b>basic</b> [2] - 19:7, 148:19</p> <p><b>basis</b> [14] - 58:7, 63:18, 79:20, 81:11, 110:15, 139:22, 145:18, 156:25, 177:9, 202:18, 203:1, 203:25, 206:6, 210:8</p> <p><b>basketball</b> [1] - 129:11</p> <p><b>Bausch</b> [2] - 67:9, 88:19</p> <p><b>BCH</b> [1] - 156:18</p> <p><b>bear</b> [3] - 140:19, 140:22, 160:15</p> <p><b>bearing</b> [3] - 26:22, 124:10, 210:16</p> <p><b>became</b> [4] - 38:12, 59:10, 71:16, 190:4</p> <p><b>become</b> [4] - 132:19, 162:3, 190:5, 196:14</p> <p><b>began</b> [2] - 25:5, 66:16</p> <p><b>begging</b> [1] - 105:18</p> <p><b>begin</b> [6] - 7:25, 9:12, 11:2, 44:6, 58:15, 92:17</p> <p><b>beginning</b> [6] - 29:7,</p>	<p>79:10, 108:4, 113:7, 133:13, 159:12</p> <p><b>begins</b> [1] - 59:5</p> <p><b>begrudged</b> [1] - 184:6</p> <p><b>behalf</b> [8] - 5:12, 5:17, 5:19, 6:1, 6:8, 7:22, 7:23, 65:4</p> <p><b>Behalf</b> [1] - 1:4</p> <p><b>behavior</b> [14] - 12:6, 35:6, 53:18, 53:19, 55:17, 162:19, 163:24, 199:11, 199:15, 199:20, 208:8, 208:21, 209:6, 209:10</p> <p><b>belabor</b> [2] - 72:15, 207:24</p> <p><b>belatedly</b> [1] - 197:14</p> <p><b>Belgian</b> [1] - 105:6</p> <p><b>Belgium</b> [1] - 105:8</p> <p><b>belie</b> [1] - 22:11</p> <p><b>belies</b> [1] - 174:16</p> <p><b>believes</b> [2] - 91:15, 193:4</p> <p><b>bell</b> [1] - 37:7</p> <p><b>Bellco</b> [1] - 106:11</p> <p><b>belong</b> [1] - 171:19</p> <p><b>below</b> [6] - 51:22, 82:6, 99:16, 151:25, 156:14, 168:11</p> <p><b>bench</b> [1] - 50:22</p> <p><b>benefit</b> [13] - 43:25, 44:6, 68:22, 88:13, 132:5, 142:17, 143:18, 143:25, 144:25, 178:5, 178:8, 202:1, 206:3</p> <p><b>benefited</b> [1] - 70:14</p> <p><b>BERGER</b> [1] - 2:7</p> <p><b>Berger</b> [1] - 5:14</p> <p><b>BERNSTEIN</b> [1] - 2:7</p> <p><b>Bernstein</b> [2] - 5:14, 5:19</p> <p><b>beside</b> [1] - 64:7</p> <p><b>besmirched</b> [1] - 167:5</p> <p><b>best</b> [6] - 65:14, 75:9, 167:15, 171:7, 178:16, 201:5</p> <p><b>better</b> [5] - 57:9, 60:8, 63:5, 135:8, 205:11</p> <p><b>between</b> [31] - 7:13, 17:9, 17:11, 18:17, 18:20, 19:22, 23:1, 24:20, 25:2, 27:3, 28:3, 35:12, 36:2, 43:10, 43:12, 59:12, 83:25, 104:11, 105:11, 122:25, 123:1, 142:8,</p>	<p>142:20, 148:13, 152:21, 160:7, 164:22, 184:11, 188:16, 199:10, 205:10</p> <p><b>beyond</b> [8] - 12:1, 14:11, 14:15, 20:17, 56:3, 161:1, 167:23, 171:18</p> <p><b>bias</b> [1] - 23:24</p> <p><b>biased</b> [1] - 24:1</p> <p><b>bid</b> [14] - 26:18, 32:9, 45:6, 98:3, 98:10, 104:12, 104:21, 104:24, 121:13, 121:19, 122:2, 129:7, 209:8</p> <p><b>bid-rigging</b> [1] - 26:18</p> <p><b>bidder</b> [1] - 44:11</p> <p><b>bidding</b> [2] - 124:2, 124:4</p> <p><b>bids</b> [6] - 96:7, 115:3, 120:23, 129:24, 135:22, 209:4</p> <p><b>big</b> [9] - 48:18, 97:10, 106:12, 129:12, 157:2, 163:20, 185:17, 189:3</p> <p><b>bigger</b> [1] - 164:15</p> <p><b>biggest</b> [3] - 98:17, 98:18, 152:6</p> <p><b>billion</b> [5] - 11:1, 29:6, 89:12, 96:1, 96:4</p> <p><b>billion-dollar</b> [1] - 89:12</p> <p><b>bind</b> [1] - 122:13</p> <p><b>binding</b> [5] - 45:15, 46:9, 122:11, 144:13, 175:18</p> <p><b>bit</b> [8] - 7:12, 40:20, 50:5, 66:1, 103:12, 116:5, 184:6, 185:2</p> <p><b>bite</b> [1] - 62:22</p> <p><b>bits</b> [1] - 77:3</p> <p><b>bizarre</b> [1] - 177:1</p> <p><b>bizarrely</b> [1] - 48:13</p> <p><b>black</b> [1] - 148:20</p> <p><b>blank</b> [2] - 11:9, 16:7</p> <p><b>blatant</b> [1] - 181:9</p> <p><b>blindly</b> [1] - 162:3</p> <p><b>blocked</b> [1] - 52:21</p> <p><b>Blomkest</b> [1] - 123:20</p> <p><b>bloody</b> [2] - 180:14, 182:23</p> <p><b>Bloomberg</b> [1] - 159:3</p> <p><b>blow</b> [1] - 81:5</p> <p><b>blown</b> [1] - 81:1</p> <p><b>board</b> [10] - 67:9, 73:7, 73:8, 92:6, 92:9, 92:16, 98:2, 98:10,</p>	<p>104:25, 146:20</p> <p><b>Boat</b> [1] - 199:1</p> <p><b>body</b> [2] - 95:20, 119:7</p> <p><b>boggles</b> [1] - 79:6</p> <p><b>boils</b> [1] - 200:18</p> <p><b>bolster</b> [1] - 45:10</p> <p><b>bolts</b> [3] - 63:17, 166:3, 166:12</p> <p><b>book</b> [2] - 82:2, 121:6</p> <p><b>bookends</b> [1] - 80:22</p> <p><b>boost</b> [2] - 98:19, 99:1</p> <p><b>boosted</b> [1] - 123:5</p> <p><b>boot</b> [1] - 26:5</p> <p><b>Boothe</b> [8] - 25:22, 54:4, 54:11, 54:16, 54:19, 133:24, 134:5, 172:23</p> <p><b>Boothe's</b> [1] - 172:25</p> <p><b>bootstrap</b> [1] - 45:10</p> <p><b>bord</b> [1] - 66:23</p> <p><b>bored</b> [1] - 138:18</p> <p><b>borne</b> [1] - 130:17</p> <p><b>boss</b> [4] - 54:3, 54:11, 63:6, 90:19</p> <p><b>bottom</b> [5] - 14:5, 77:17, 87:15, 92:12, 135:10</p> <p><b>bought</b> [4] - 58:14, 61:19, 152:5, 189:21</p> <p><b>bound</b> [1] - 136:5</p> <p><b>bounds</b> [1] - 192:15</p> <p><b>Bradley</b> [3] - 168:4, 168:5, 168:7</p> <p><b>Brand</b> [1] - 156:19</p> <p><b>brands</b> [1] - 91:18</p> <p><b>bread</b> [4] - 123:12, 181:25, 182:1, 182:2</p> <p><b>break</b> [12] - 7:13, 64:21, 64:23, 64:24, 93:25, 94:1, 94:3, 94:4, 95:3, 161:10, 161:14</p> <p><b>breathe</b> [1] - 22:17</p> <p><b>brief</b> [43] - 51:13, 51:14, 55:22, 62:22, 69:8, 71:3, 73:1, 74:3, 80:25, 81:1, 81:2, 81:8, 89:3, 100:23, 108:16, 116:8, 119:25, 121:5, 123:17, 128:7, 136:17, 137:20, 141:7, 147:23, 149:7, 157:8, 171:8, 172:4, 175:17, 175:19, 176:18, 188:9, 188:22, 189:17, 192:3, 192:10, 192:18, 192:25,</p>	<p>193:17, 200:4, 204:11, 205:15</p> <p><b>briefed</b> [1] - 131:24</p> <p><b>briefe</b> [1] - 195:2</p> <p><b>briefing</b> [6] - 34:14, 37:19, 38:21, 39:11, 43:2, 94:22</p> <p><b>briefly</b> [9] - 18:2, 69:22, 83:10, 89:6, 123:18, 141:9, 195:1, 196:10, 197:9</p> <p><b>briefs</b> [12] - 50:15, 55:15, 65:10, 96:9, 109:6, 110:6, 110:20, 110:21, 148:17, 193:8, 199:23, 201:11</p> <p><b>bring</b> [10] - 8:14, 9:19, 20:2, 24:6, 25:9, 29:10, 50:8, 52:25, 59:20, 190:7</p> <p><b>bringing</b> [1] - 57:23</p> <p><b>brings</b> [1] - 119:11</p> <p><b>Bristol</b> [2] - 110:8, 186:24</p> <p><b>Bristol-Myers</b> [2] - 110:8, 186:24</p> <p><b>Broad</b> [1] - 3:4</p> <p><b>broad</b> [2] - 33:13, 33:18</p> <p><b>broader</b> [3] - 79:18, 112:10, 157:23</p> <p><b>Brodsky</b> [10] - 6:7, 65:4, 113:20, 113:21, 144:1, 181:11, 184:5, 184:13, 188:24</p> <p><b>BRODSKY</b> [7] - 2:20, 4:6, 6:7, 64:21, 65:1, 166:16, 175:13</p> <p><b>Brodsky's</b> [1] - 20:23</p> <p><b>broke</b> [1] - 29:15</p> <p><b>broken</b> [1] - 102:22</p> <p><b>brought</b> [11] - 15:16, 19:13, 29:14, 45:7, 52:20, 91:4, 117:9, 117:11, 136:22, 164:3, 178:19</p> <p><b>brown</b> [40] - 42:20, 43:12, 51:1, 53:22, 53:23, 54:5, 54:22, 55:8, 55:19, 55:24, 57:4, 57:19, 59:8, 59:16, 59:17, 60:4, 60:11, 62:18, 62:21, 64:6, 64:8, 64:12, 65:14, 97:22, 99:20, 100:19, 101:13, 101:15, 101:17, 101:25, 102:22,</p>
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<p>103:14, 105:4, 131:8, 163:6, 165:4, 166:22, 174:2, 174:8, 180:7</p> <p><b>Brown</b> [83] - 3:5, 6:10, 10:5, 10:21, 12:5, 41:8, 41:10, 41:14, 51:8, 51:19, 51:24, 52:2, 52:4, 52:7, 52:8, 52:15, 52:17, 52:19, 52:20, 52:24, 53:5, 53:11, 53:14, 53:15, 59:2, 61:12, 96:11, 97:11, 98:7, 98:11, 98:17, 98:23, 99:14, 100:5, 102:11, 102:15, 103:6, 104:18, 105:5, 105:21, 106:4, 106:16, 107:7, 107:13, 107:18, 107:24, 108:6, 108:16, 109:13, 111:6, 111:8, 113:2, 113:9, 113:15, 113:17, 114:16, 126:25, 130:1, 130:4, 131:24, 132:10, 132:17, 132:21, 132:25, 133:1, 133:21, 134:3, 134:6, 134:12, 134:13, 134:25, 135:15, 136:13, 138:1, 138:5, 161:21, 162:9, 162:16, 163:19, 164:10, 187:22, 193:6</p> <p><b>brown's</b> [4] - 54:20, 62:8, 100:21, 163:9</p> <p><b>Brown's</b> [2] - 6:25, 100:3</p> <p><b>Brunswick</b> [1] - 199:1</p> <p><b>brunt</b> [1] - 138:18</p> <p><b>Brussels</b> [2] - 102:1, 102:2</p> <p><b>BUCK</b> [1] - 2:21</p> <p><b>budget</b> [2] - 85:23, 85:24</p> <p><b>Building</b> [1] - 1:10</p> <p><b>building</b> [1] - 101:22</p> <p><b>builds</b> [1] - 205:16</p> <p><b>built</b> [1] - 76:18</p> <p><b>bullet</b> [1] - 78:25</p> <p><b>burden</b> [15] - 30:13, 30:15, 32:20, 34:15, 43:16, 47:19, 47:25, 51:17, 64:16, 67:18,</p>	<p>82:15, 149:8, 149:11, 160:15</p> <p><b>bury</b> [1] - 194:17</p> <p><b>business</b> [49] - 16:12, 18:3, 19:8, 30:22, 30:24, 32:3, 32:7, 32:9, 32:14, 35:13, 46:3, 49:4, 49:5, 49:11, 75:20, 78:25, 80:7, 80:9, 81:12, 82:2, 82:11, 101:4, 101:6, 102:11, 103:6, 121:17, 121:20, 122:19, 128:13, 134:24, 135:7, 153:10, 154:20, 159:7, 170:5, 172:13, 187:19, 188:5, 196:19, 196:21, 196:22, 196:23, 196:25, 197:6, 207:10, 207:16, 209:8</p> <p><b>businesses</b> [2] - 84:12, 135:8</p> <p><b>but-for</b> [1] - 195:16</p> <p><b>buy</b> [5] - 37:3, 70:5, 83:18, 144:14, 144:19</p> <p><b>BY</b> [13] - 1:18, 2:3, 2:7, 2:11, 2:15, 2:20, 3:3, 4:5, 4:6, 4:7, 4:8, 4:11, 4:12</p> <p><b>bypass</b> [1] - 27:12</p> <tr> <td colspan="2" style="text-align: center;"><b>C</b></td></tr> <td> <p><b>C-Suite</b> [1] - 41:6</p> <p><b>calculates</b> [1] - 206:6</p> <p><b>calendar</b> [1] - 169:6</p> <p><b>Canadian</b> [1] - 118:1</p> <p><b>canceled</b> [3] - 70:19, 70:21, 85:10</p> <p><b>canceled</b> [2] - 85:13, 85:17</p> <p><b>cancels</b> [1] - 71:13</p> <p><b>candid</b> [1] - 108:20</p> <p><b>candidly</b> [1] - 122:2</p> <p><b>cannot</b> [23] - 11:25, 23:7, 26:12, 27:6, 33:18, 33:22, 36:13, 39:6, 48:9, 58:15, 74:14, 96:24, 97:2, 97:5, 97:6, 114:2, 124:7, 171:19, 179:11, 181:8, 189:24, 192:13, 210:13</p> <p><b>cap</b> [1] - 37:4</p> </td> <td> <p><b>capable</b> [4] - 27:24, 28:15, 116:16, 120:14</p> <p><b>capacity</b> [2] - 167:18, 167:20</p> <p><b>Capital</b> [3] - 127:1, 192:9</p> <p><b>capital</b> [4] - 127:2, 135:17, 135:18</p> <p><b>caps</b> [1] - 109:20</p> <p><b>car</b> [3] - 148:19, 148:20, 148:22</p> <p><b>care</b> [3] - 68:10, 83:12, 83:25</p> <p><b>cared</b> [1] - 83:15</p> <p><b>career</b> [1] - 11:8</p> <p><b>carefully</b> [1] - 92:2</p> <p><b>cares</b> [1] - 84:3</p> <p><b>Carmicle</b> [1] - 193:7</p> <p><b>carried</b> [1] - 50:11</p> <p><b>cartel</b> [1] - 199:15</p> <p><b>cascade</b> [1] - 134:7</p> <p><b>case</b> [191] - 8:2, 8:21, 9:16, 11:15, 11:17, 12:18, 13:3, 19:1, 19:23, 20:3, 23:6, 23:12, 23:19, 24:4, 24:5, 24:6, 24:7, 25:5, 25:8, 26:8, 26:13, 26:22, 26:24, 27:11, 28:20, 29:12, 30:21, 31:25, 32:17, 33:11, 34:2, 35:7, 37:19, 37:20, 37:23, 37:25, 38:7, 38:16, 38:17, 38:24, 39:4, 39:10, 39:14, 39:15, 39:16, 43:2, 43:16, 49:23, 50:5, 50:9, 51:22, 52:1, 52:6, 52:8, 52:22, 53:4, 53:17, 53:18, 54:2, 55:4, 55:14, 55:19, 55:24, 56:3, 56:18, 57:2, 57:5, 57:18, 58:6, 58:8, 59:9, 60:3, 60:12, 64:5, 65:13, 65:15, 66:2, 66:13, 68:13, 71:2, 79:10, 93:19, 95:1, 97:1, 97:4, 97:8, 106:24, 109:3, 110:2, 110:8, 111:24, 116:17, 118:2, 120:8, 122:22, 123:20, 124:1, 124:8, 124:16, 127:1, 137:3, 138:19, 140:17, 141:6,</p> </td> <td> <p>147:10, 148:9, 148:24, 149:17, 150:9, 150:10, 150:14, 151:22, 153:16, 153:20, 153:21, 162:3, 162:8, 162:13, 162:14, 163:4, 163:5, 163:6, 163:10, 164:3, 171:13, 175:16, 175:18, 175:19, 175:20, 176:7, 176:10, 176:13, 176:15, 177:1, 177:20, 178:1, 178:13, 178:17, 178:18, 179:25, 180:3, 180:10, 180:16, 180:18, 180:22, 181:1, 181:4, 182:14, 182:21, 182:24, 182:25, 184:3, 185:2, 185:4, 185:17, 186:1, 186:19, 186:24, 189:23, 191:11, 191:17, 193:7, 193:14, 193:15, 193:16, 193:23, 194:3, 194:18, 199:13, 199:14, 200:7, 201:7, 202:10, 202:18, 203:19, 203:20, 205:10, 205:16, 208:2, 210:9, 211:5</p> <p><b>cases</b> [39] - 12:21, 15:2, 19:20, 19:22, 19:24, 24:17, 29:14, 34:23, 38:21, 39:11, 56:20, 56:22, 71:3, 96:8, 108:14, 110:25, 111:23, 115:8, 117:18, 117:24, 120:2, 123:17, 135:24, 135:25, 163:10, 178:12, 179:11, 181:19, 189:15, 189:18, 198:4, 198:8, 198:19, 202:5, 202:7, 203:20, 204:8, 204:12</p> <p><b>cash</b> [3] - 63:22, 102:11, 158:15</p> <p><b>catatonic</b> [1] - 107:25</p> <p><b>categories</b> [6] - 80:18, 111:15, 111:22,</p> </td> <td> <p>112:9, 136:22</p> <p><b>category</b> [8] - 35:18, 80:15, 80:17, 81:11, 82:10, 128:10, 128:12, 171:12</p> <p><b>causation</b> [37] - 8:4, 43:16, 44:16, 47:19, 47:23, 48:1, 48:9, 49:1, 50:15, 94:17, 139:2, 139:25, 141:2, 141:5, 145:12, 147:2, 148:2, 148:5, 149:2, 149:9, 149:13, 149:16, 150:6, 150:8, 150:12, 153:25, 158:4, 161:7, 177:21, 177:22, 188:19, 195:5, 195:6, 204:3, 204:22, 206:9</p> <p><b>CAUSATION</b> [1] - 4:3</p> <p><b>caused</b> [8] - 106:15, 139:23, 141:11, 150:13, 156:18, 187:15, 189:11, 195:10</p> <p><b>causes</b> [2] - 148:14, 187:24</p> <p><b>causing</b> [3] - 131:15, 153:14, 188:4</p> <p><b>CCR</b> [1] - 211:24</p> <p><b>cease</b> [1] - 132:18</p> <p><b>ceded</b> [1] - 32:9</p> <p><b>ceding</b> [2] - 32:14, 200:10</p> <p><b>center</b> [1] - 134:16</p> <p><b>centers</b> [1] - 35:11</p> <p><b>central</b> [2] - 13:12, 188:12</p> <p><b>CEO</b> [18] - 48:12, 66:23, 67:9, 70:22, 100:4, 101:25, 134:3, 152:13, 155:22, 173:3, 184:7, 184:8, 186:12, 187:17, 187:25, 196:14, 196:16</p> <p><b>CEO's</b> [2] - 109:4, 154:20</p> <p><b>certain</b> [12] - 12:9, 33:17, 38:5, 111:4, 120:11, 129:10, 146:5, 146:11, 153:7, 170:8, 192:14, 197:17</p> <p><b>certainly</b> [10] - 29:11, 32:16, 38:19, 44:13, 81:24, 144:3, 146:7,</p> </td>	<b>C</b>		<p><b>C-Suite</b> [1] - 41:6</p> <p><b>calculates</b> [1] - 206:6</p> <p><b>calendar</b> [1] - 169:6</p> <p><b>Canadian</b> [1] - 118:1</p> <p><b>canceled</b> [3] - 70:19, 70:21, 85:10</p> <p><b>canceled</b> [2] - 85:13, 85:17</p> <p><b>cancels</b> [1] - 71:13</p> <p><b>candid</b> [1] - 108:20</p> <p><b>candidly</b> [1] - 122:2</p> <p><b>cannot</b> [23] - 11:25, 23:7, 26:12, 27:6, 33:18, 33:22, 36:13, 39:6, 48:9, 58:15, 74:14, 96:24, 97:2, 97:5, 97:6, 114:2, 124:7, 171:19, 179:11, 181:8, 189:24, 192:13, 210:13</p> <p><b>cap</b> [1] - 37:4</p>	<p><b>capable</b> [4] - 27:24, 28:15, 116:16, 120:14</p> <p><b>capacity</b> [2] - 167:18, 167:20</p> <p><b>Capital</b> [3] - 127:1, 192:9</p> <p><b>capital</b> [4] - 127:2, 135:17, 135:18</p> <p><b>caps</b> [1] - 109:20</p> <p><b>car</b> [3] - 148:19, 148:20, 148:22</p> <p><b>care</b> [3] - 68:10, 83:12, 83:25</p> <p><b>cared</b> [1] - 83:15</p> <p><b>career</b> [1] - 11:8</p> <p><b>carefully</b> [1] - 92:2</p> <p><b>cares</b> [1] - 84:3</p> <p><b>Carmicle</b> [1] - 193:7</p> <p><b>carried</b> [1] - 50:11</p> <p><b>cartel</b> [1] - 199:15</p> <p><b>cascade</b> [1] - 134:7</p> <p><b>case</b> [191] - 8:2, 8:21, 9:16, 11:15, 11:17, 12:18, 13:3, 19:1, 19:23, 20:3, 23:6, 23:12, 23:19, 24:4, 24:5, 24:6, 24:7, 25:5, 25:8, 26:8, 26:13, 26:22, 26:24, 27:11, 28:20, 29:12, 30:21, 31:25, 32:17, 33:11, 34:2, 35:7, 37:19, 37:20, 37:23, 37:25, 38:7, 38:16, 38:17, 38:24, 39:4, 39:10, 39:14, 39:15, 39:16, 43:2, 43:16, 49:23, 50:5, 50:9, 51:22, 52:1, 52:6, 52:8, 52:22, 53:4, 53:17, 53:18, 54:2, 55:4, 55:14, 55:19, 55:24, 56:3, 56:18, 57:2, 57:5, 57:18, 58:6, 58:8, 59:9, 60:3, 60:12, 64:5, 65:13, 65:15, 66:2, 66:13, 68:13, 71:2, 79:10, 93:19, 95:1, 97:1, 97:4, 97:8, 106:24, 109:3, 110:2, 110:8, 111:24, 116:17, 118:2, 120:8, 122:22, 123:20, 124:1, 124:8, 124:16, 127:1, 137:3, 138:19, 140:17, 141:6,</p>	<p>147:10, 148:9, 148:24, 149:17, 150:9, 150:10, 150:14, 151:22, 153:16, 153:20, 153:21, 162:3, 162:8, 162:13, 162:14, 163:4, 163:5, 163:6, 163:10, 164:3, 171:13, 175:16, 175:18, 175:19, 175:20, 176:7, 176:10, 176:13, 176:15, 177:1, 177:20, 178:1, 178:13, 178:17, 178:18, 179:25, 180:3, 180:10, 180:16, 180:18, 180:22, 181:1, 181:4, 182:14, 182:21, 182:24, 182:25, 184:3, 185:2, 185:4, 185:17, 186:1, 186:19, 186:24, 189:23, 191:11, 191:17, 193:7, 193:14, 193:15, 193:16, 193:23, 194:3, 194:18, 199:13, 199:14, 200:7, 201:7, 202:10, 202:18, 203:19, 203:20, 205:10, 205:16, 208:2, 210:9, 211:5</p> <p><b>cases</b> [39] - 12:21, 15:2, 19:20, 19:22, 19:24, 24:17, 29:14, 34:23, 38:21, 39:11, 56:20, 56:22, 71:3, 96:8, 108:14, 110:25, 111:23, 115:8, 117:18, 117:24, 120:2, 123:17, 135:24, 135:25, 163:10, 178:12, 179:11, 181:19, 189:15, 189:18, 198:4, 198:8, 198:19, 202:5, 202:7, 203:20, 204:8, 204:12</p> <p><b>cash</b> [3] - 63:22, 102:11, 158:15</p> <p><b>catatonic</b> [1] - 107:25</p> <p><b>categories</b> [6] - 80:18, 111:15, 111:22,</p>	<p>112:9, 136:22</p> <p><b>category</b> [8] - 35:18, 80:15, 80:17, 81:11, 82:10, 128:10, 128:12, 171:12</p> <p><b>causation</b> [37] - 8:4, 43:16, 44:16, 47:19, 47:23, 48:1, 48:9, 49:1, 50:15, 94:17, 139:2, 139:25, 141:2, 141:5, 145:12, 147:2, 148:2, 148:5, 149:2, 149:9, 149:13, 149:16, 150:6, 150:8, 150:12, 153:25, 158:4, 161:7, 177:21, 177:22, 188:19, 195:5, 195:6, 204:3, 204:22, 206:9</p> <p><b>CAUSATION</b> [1] - 4:3</p> <p><b>caused</b> [8] - 106:15, 139:23, 141:11, 150:13, 156:18, 187:15, 189:11, 195:10</p> <p><b>causes</b> [2] - 148:14, 187:24</p> <p><b>causing</b> [3] - 131:15, 153:14, 188:4</p> <p><b>CCR</b> [1] - 211:24</p> <p><b>cease</b> [1] - 132:18</p> <p><b>ceded</b> [1] - 32:9</p> <p><b>ceding</b> [2] - 32:14, 200:10</p> <p><b>center</b> [1] - 134:16</p> <p><b>centers</b> [1] - 35:11</p> <p><b>central</b> [2] - 13:12, 188:12</p> <p><b>CEO</b> [18] - 48:12, 66:23, 67:9, 70:22, 100:4, 101:25, 134:3, 152:13, 155:22, 173:3, 184:7, 184:8, 186:12, 187:17, 187:25, 196:14, 196:16</p> <p><b>CEO's</b> [2] - 109:4, 154:20</p> <p><b>certain</b> [12] - 12:9, 33:17, 38:5, 111:4, 120:11, 129:10, 146:5, 146:11, 153:7, 170:8, 192:14, 197:17</p> <p><b>certainly</b> [10] - 29:11, 32:16, 38:19, 44:13, 81:24, 144:3, 146:7,</p>
<b>C</b>							

<p>147:5, 150:23, 210:23</p> <p><b>CERTIFICATE</b> [1] - 211:19</p> <p><b>certification</b> [1] - 157:8</p> <p><b>certify</b> [1] - 211:21</p> <p><b>cetera</b> [2] - 105:2, 117:8</p> <p><b>CFO</b> [7] - 54:20, 61:9, 61:10, 124:23, 134:2, 166:6, 173:3</p> <p><b>chain</b> [5] - 20:10, 22:14, 42:5, 42:8, 42:20</p> <p><b>chairman</b> [2] - 66:23, 67:9</p> <p><b>challenge</b> [15] - 29:1, 36:1, 43:13, 65:13, 70:21, 80:6, 88:2, 161:12, 170:7, 170:8, 200:19, 200:21, 204:10, 205:4, 207:8</p> <p><b>challenged</b> [9] - 33:25, 37:13, 39:21, 48:8, 49:6, 67:23, 70:20, 193:12, 200:20</p> <p><b>challenges</b> [3] - 90:22, 146:20, 201:2</p> <p><b>challenging</b> [1] - 84:14</p> <p><b>chance</b> [1] - 79:12</p> <p><b>chances</b> [1] - 195:12</p> <p><b>change</b> [11] - 25:10, 47:3, 63:5, 63:7, 70:5, 70:6, 123:6, 141:19, 162:13, 179:25, 195:20</p> <p><b>changed</b> [2] - 47:10, 206:24</p> <p><b>changes</b> [3] - 31:11, 209:16, 210:13</p> <p><b>changing</b> [4] - 47:6, 47:7, 61:23, 133:15</p> <p><b>channel</b> [1] - 106:10</p> <p><b>channel-stuffing</b> [1] - 106:10</p> <p><b>channelled</b> [1] - 40:7</p> <p><b>channels</b> [1] - 40:8</p> <p><b>chaos</b> [1] - 102:21</p> <p><b>character</b> [2] - 70:24, 74:22</p> <p><b>characteristics</b> [1] - 208:12</p> <p><b>characterization</b> [2] - 147:20, 175:17</p> <p><b>characterized</b> [2] - 207:21, 207:22</p>	<p><b>charge</b> [2] - 62:16, 90:20</p> <p><b>charged</b> [3] - 95:20, 130:16, 137:18</p> <p><b>charges</b> [8] - 9:19, 9:23, 23:4, 59:3, 59:6, 59:12, 117:11, 152:4</p> <p><b>chart</b> [2] - 34:22, 159:10</p> <p><b>CHC</b> [7] - 157:18, 158:10, 196:21, 196:25, 197:5, 206:13</p> <p><b>cherry</b> [3] - 82:8, 82:17, 95:23</p> <p><b>cherry-picked</b> [2] - 82:8, 95:23</p> <p><b>chief</b> [4] - 86:10, 88:11, 100:13</p> <p><b>Chocolate</b> [10] - 12:16, 12:18, 16:2, 19:19, 31:25, 117:25, 122:22, 125:8, 182:6, 198:3</p> <p><b>choose</b> [1] - 128:23</p> <p><b>choosing</b> [1] - 144:19</p> <p><b>chose</b> [4] - 132:15, 138:16, 142:21, 144:20</p> <p><b>chosen</b> [1] - 146:15</p> <p><b>Chris</b> [1] - 178:17</p> <p><b>Chris-Craft</b> [1] - 178:17</p> <p><b>Christine</b> [5] - 40:11, 40:14, 40:19, 40:20, 180:13</p> <p><b>Chrysler</b> [1] - 147:9</p> <p><b>Circuit</b> [62] - 10:17, 10:23, 12:3, 12:12, 12:20, 13:17, 14:1, 14:9, 14:18, 16:2, 16:18, 16:20, 18:24, 19:4, 19:19, 20:3, 21:8, 21:12, 31:25, 32:19, 33:1, 37:18, 37:22, 38:9, 38:16, 42:22, 43:3, 43:7, 60:14, 68:9, 68:11, 96:23, 101:10, 108:14, 110:10, 116:18, 117:23, 121:1, 122:23, 122:25, 124:14, 125:8, 128:23, 148:9, 181:13, 181:18, 184:17, 184:18, 185:25, 186:3, 186:4, 188:15, 191:11,</p>	<p>191:18, 197:24, 198:4, 198:6, 198:19, 198:24, 199:2, 199:9</p> <p><b>circuit</b> [2] - 23:3, 109:23</p> <p><b>Circuit's</b> [2] - 124:9, 182:4</p> <p><b>circular</b> [5] - 145:11, 177:23, 177:24, 178:9, 189:14</p> <p><b>circumstance</b> [1] - 189:18</p> <p><b>circumstances</b> [6] - 38:11, 111:7, 123:15, 130:13, 189:4, 189:16</p> <p><b>circumstantial</b> [25] - 16:9, 19:8, 20:9, 22:13, 22:15, 26:25, 34:20, 52:5, 53:4, 72:12, 110:24, 111:1, 111:12, 114:24, 120:24, 121:2, 121:3, 122:17, 124:7, 126:4, 126:6, 133:19, 180:20, 186:6, 186:9</p> <p><b>cite</b> [29] - 23:19, 25:16, 45:19, 55:14, 56:19, 58:17, 58:23, 59:1, 59:14, 71:3, 73:1, 85:20, 111:14, 111:23, 115:8, 120:2, 120:8, 135:24, 141:6, 146:17, 147:9, 150:9, 150:11, 175:18, 176:25, 179:11, 186:20, 203:19, 204:12</p> <p><b>cited</b> [18] - 19:25, 58:6, 96:9, 110:8, 110:25, 117:17, 117:25, 124:1, 128:7, 140:17, 146:19, 158:10, 192:9, 192:18, 193:7, 193:16, 201:10, 203:14</p> <p><b>cites</b> [1] - 123:17</p> <p><b>citing</b> [1] - 158:2</p> <p><b>City</b> [1] - 37:21</p> <p><b>CIVIL</b> [1] - 1:3</p> <p><b>civil</b> [4] - 10:3, 22:18, 23:12, 179:22</p> <p><b>claim</b> [55] - 9:5, 18:1, 20:2, 29:25, 33:14, 39:1, 39:7, 39:8,</p>	<p>43:19, 43:20, 43:21, 44:21, 47:16, 47:22, 48:2, 48:6, 52:11, 52:25, 54:4, 55:20, 57:14, 57:19, 58:5, 67:20, 71:22, 78:8, 79:14, 79:17, 91:1, 92:5, 100:21, 103:21, 137:22, 139:11, 139:16, 140:5, 143:11, 145:14, 147:4, 172:21, 177:10, 178:1, 178:4, 178:19, 179:13, 180:5, 184:1, 189:14, 189:16, 189:25, 190:7, 205:12</p> <p><b>claimed</b> [4] - 58:8, 72:7, 130:20, 131:9</p> <p><b>claiming</b> [3] - 10:12, 131:6, 133:9</p> <p><b>claims</b> [62] - 8:14, 8:16, 8:17, 8:18, 9:1, 9:13, 11:2, 11:24, 12:13, 12:19, 18:2, 18:4, 22:17, 30:8, 30:11, 34:13, 35:22, 35:25, 43:23, 44:17, 44:22, 47:4, 48:2, 48:10, 48:12, 50:6, 50:11, 52:20, 65:9, 65:22, 72:8, 82:22, 82:24, 93:17, 93:18, 97:1, 114:21, 117:1, 131:1, 134:8, 136:20, 137:7, 137:8, 138:19, 139:19, 148:1, 148:3, 175:25, 176:4, 176:15, 177:12, 178:4, 178:11, 182:12, 183:16, 185:4, 188:7, 188:8, 190:4, 191:23, 196:5, 198:5</p> <p><b>clarification</b> [2] - 163:2, 208:18</p> <p><b>Clarification</b> [1] - 21:20</p> <p><b>Clark</b> [24] - 6:24, 12:24, 53:6, 53:10, 117:16, 121:6, 125:13, 126:15, 195:1, 197:9, 197:10, 197:14, 197:15, 198:11, 198:21, 199:10, 199:20, 207:6,</p>	<p>207:15, 207:20, 207:25, 208:14, 210:7, 210:10</p> <p><b>Clark's</b> [4] - 197:11, 198:9, 210:1, 210:4</p> <p><b>class</b> [43] - 25:4, 25:11, 26:19, 69:13, 69:20, 69:22, 71:8, 71:11, 71:20, 76:8, 76:13, 80:14, 80:22, 83:13, 92:7, 96:12, 97:17, 98:5, 108:4, 113:1, 113:4, 113:14, 132:7, 132:11, 133:13, 137:3, 137:4, 143:12, 157:8, 173:19, 175:15, 175:16, 175:17, 175:22, 175:24, 176:8, 176:19, 184:1, 185:1, 188:9</p> <p><b>classes</b> [1] - 175:25</p> <p><b>classic</b> [3] - 13:4, 15:9, 108:18</p> <p><b>clean</b> [1] - 7:13</p> <p><b>cleansed</b> [1] - 117:4</p> <p><b>cleansing</b> [1] - 44:19</p> <p><b>clear</b> [37] - 16:19, 19:1, 23:19, 25:15, 26:1, 27:8, 31:5, 34:15, 37:7, 42:15, 46:1, 80:12, 90:23, 91:10, 96:23, 100:12, 108:14, 110:5, 111:3, 112:20, 121:1, 128:24, 175:21, 176:11, 177:10, 177:14, 179:20, 180:5, 182:5, 188:15, 189:3, 189:19, 194:3, 194:12, 197:25, 207:18</p> <p><b>Clear</b> [1] - 103:1</p> <p><b>clearing</b> [1] - 51:15</p> <p><b>clearly</b> [9] - 36:11, 42:2, 82:6, 137:7, 165:18, 176:2, 181:11, 181:21, 181:22</p> <p><b>clerked</b> [1] - 211:6</p> <p><b>client</b> [3] - 59:2, 164:3, 164:8</p> <p><b>client's</b> [1] - 186:14</p> <p><b>clients</b> [2] - 8:8, 31:13</p> <p><b>Clindamycin</b> [1] - 127:6</p> <p><b>clinical</b> [1] - 78:1</p>
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<p><b>close</b> [15] - 17:24, 20:21, 21:13, 34:17, 45:23, 57:20, 63:2, 68:4, 72:13, 99:20, 136:4, 154:4, 159:14, 194:9, 199:7</p> <p><b>closed</b> [4] - 35:14, 37:15, 60:16, 170:24</p> <p><b>closely</b> [2] - 154:24, 155:1</p> <p><b>closer</b> [1] - 6:19</p> <p><b>closes</b> [1] - 59:15</p> <p><b>closing</b> [7] - 11:1, 36:22, 38:17, 85:3, 85:21, 89:3, 165:9</p> <p><b>coincide</b> [1] - 107:22</p> <p><b>coincidence</b> [1] - 127:9</p> <p><b>collaborating</b> [1] - 40:5</p> <p><b>collapsed</b> [1] - 107:15</p> <p><b>collate</b> [1] - 50:10</p> <p><b>colleague</b> [4] - 6:1, 34:25, 35:1, 94:17</p> <p><b>colleagues</b> [5] - 8:6, 18:15, 36:6, 84:19</p> <p><b>collect</b> [1] - 93:12</p> <p><b>collective</b> [3] - 46:25, 47:1, 151:22</p> <p><b>colloquial</b> [1] - 202:24</p> <p><b>collude</b> [4] - 18:7, 31:24, 75:23, 75:25</p> <p><b>colluded</b> [1] - 121:4</p> <p><b>collusion</b> [44] - 11:10, 11:16, 11:22, 12:7, 14:20, 15:16, 16:24, 17:16, 18:8, 18:10, 19:2, 19:3, 19:16, 20:13, 20:20, 21:2, 25:13, 30:11, 32:5, 32:16, 33:2, 34:12, 34:19, 34:21, 96:10, 115:8, 120:25, 121:9, 122:18, 123:19, 124:7, 125:23, 126:5, 159:7, 159:24, 177:13, 198:2, 198:15, 198:20, 198:22, 199:17, 199:21, 208:17</p> <p><b>collusive</b> [8] - 8:24, 10:5, 11:7, 29:25, 160:5, 177:4, 177:16, 177:18</p> <p><b>colorable</b> [2] - 68:3, 171:1</p> <p><b>Columbia</b> [1] - 117:8</p> <p><b>combed</b> [1] - 74:1</p> <p><b>combining</b> [1] - 84:12</p>	<p><b>comfortable</b> [2] - 6:17, 6:21</p> <p><b>coming</b> [4] - 29:22, 99:7, 152:22, 168:22</p> <p><b>command</b> [1] - 62:3</p> <p><b>Commencing</b> [1] - 1:12</p> <p><b>commend</b> [1] - 211:9</p> <p><b>comment</b> [9] - 58:13, 80:1, 82:11, 128:13, 129:16, 171:11, 184:4</p> <p><b>commentary</b> [4] - 153:1, 157:24, 184:9, 205:25</p> <p><b>comments</b> [7] - 62:21, 77:17, 133:1, 152:12, 179:17, 183:9, 186:14</p> <p><b>commercial</b> [9] - 53:25, 83:24, 84:2, 84:3, 87:5, 88:15, 88:23, 90:23, 100:7</p> <p><b>Commission</b> [1] - 202:8</p> <p><b>committee</b> [19] - 30:23, 31:1, 31:6, 31:9, 32:6, 53:23, 75:5, 75:7, 75:8, 100:4, 100:5, 102:3, 106:18, 107:2, 108:25, 109:16, 134:12, 138:9</p> <p><b>common</b> [8] - 21:8, 21:11, 35:6, 36:25, 135:13, 144:15, 174:16</p> <p><b>communicated</b> [1] - 26:3</p> <p><b>communication</b> [4] - 7:2, 25:2, 25:12, 105:3</p> <p><b>communications</b> [12] - 18:14, 18:18, 23:1, 24:20, 25:6, 26:7, 28:2, 33:9, 41:9, 116:1, 119:18, 119:23</p> <p><b>companies</b> [17] - 13:8, 13:21, 29:15, 32:23, 37:2, 37:3, 58:16, 59:18, 60:9, 60:16, 77:14, 151:3, 154:19, 159:5, 166:3, 166:9, 194:15</p> <p><b>company</b> [67] - 7:11, 13:10, 27:4, 27:5, 27:18, 28:4, 28:10, 28:23, 35:13, 36:17, 41:7, 44:24, 45:1,</p>	<p>45:17, 48:19, 51:10, 59:9, 61:19, 62:14, 62:15, 70:1, 89:12, 91:18, 95:24, 97:19, 97:25, 104:17, 114:25, 115:1, 115:17, 115:24, 120:10, 122:14, 142:16, 143:22, 146:22, 154:5, 154:13, 155:11, 156:15, 156:25, 160:7, 163:20, 163:22, 164:15, 164:16, 164:17, 164:23, 167:19, 167:23, 168:6, 168:15, 168:17, 168:23, 169:1, 174:25, 175:3, 188:6, 194:16, 196:24, 206:19, 206:20</p> <p><b>Company</b> [2] - 2:13, 2:18</p> <p><b>company's</b> [5] - 14:3, 32:15, 39:6, 160:4, 193:23</p> <p><b>company-specific</b> [1] - 156:25</p> <p><b>compare</b> [1] - 69:20</p> <p><b>compares</b> [1] - 152:21</p> <p><b>comparison</b> [2] - 19:22, 164:22</p> <p><b>compelling</b> [1] - 69:23</p> <p><b>compensate</b> [1] - 139:19</p> <p><b>compensation</b> [4] - 140:10, 141:18, 141:21, 142:11</p> <p><b>compete</b> [1] - 15:12</p> <p><b>competed</b> [2] - 34:5, 126:19</p> <p><b>competing</b> [3] - 77:14, 111:21, 136:7</p> <p><b>competition</b> [15] - 55:1, 56:25, 57:1, 71:23, 77:24, 121:10, 129:6, 129:9, 133:16, 134:14, 162:25, 163:7, 163:11, 183:22, 198:16</p> <p><b>competitive</b> [30] - 13:14, 32:4, 33:14, 34:8, 77:12, 77:15, 77:16, 78:3, 111:17, 111:20, 112:2, 112:16, 114:20, 114:23, 128:24,</p>	<p>129:3, 129:10, 129:15, 130:6, 132:3, 133:11, 133:15, 137:14, 157:25, 162:23, 177:19, 183:15, 183:20, 183:21, 207:22</p> <p><b>competitiveness</b> [3] - 33:19, 67:13, 77:10</p> <p><b>competitor</b> [12] - 18:5, 25:13, 31:7, 96:6, 121:21, 122:3, 125:9, 125:23, 129:2, 129:8, 136:1, 209:9</p> <p><b>competitor's</b> [3] - 20:19, 21:2, 32:22</p> <p><b>competitors</b> [35] - 8:24, 11:21, 13:2, 13:18, 13:23, 13:25, 15:12, 15:20, 15:24, 16:13, 16:21, 17:7, 17:10, 17:12, 18:11, 18:17, 20:12, 21:9, 21:14, 23:2, 32:10, 32:11, 33:3, 34:5, 78:16, 115:1, 122:21, 125:2, 126:13, 127:18, 129:5, 136:7, 208:10, 208:11, 209:17</p> <p><b>Competitors</b> [1] - 198:13</p> <p><b>competitors's</b> [1] - 21:16</p> <p><b>complain</b> [7] - 16:11, 19:12, 21:11, 33:12, 35:5, 38:8, 46:12</p> <p><b>complained</b> [2] - 48:7, 86:24</p> <p><b>complaining</b> [5] - 63:11, 63:12, 63:13, 87:1, 181:22</p> <p><b>complaint</b> [77] - 8:25, 9:15, 10:13, 10:15, 19:14, 21:19, 22:18, 22:22, 22:23, 22:25, 23:1, 23:8, 23:10, 23:15, 23:17, 23:25, 24:15, 24:19, 25:7, 25:9, 25:10, 26:6, 26:18, 28:21, 28:24, 29:14, 33:12, 35:24, 40:9, 40:23, 41:18, 41:25, 42:3, 42:14, 43:14, 47:25, 48:22, 52:14, 56:5, 56:6, 56:21, 116:4, 116:5,</p>	<p>116:7, 116:8, 116:10, 118:16, 118:24, 119:14, 119:19, 119:21, 119:24, 120:3, 120:9, 120:20, 136:23, 150:21, 175:23, 176:1, 176:2, 176:7, 176:8, 176:10, 176:12, 176:16, 176:25, 177:5, 177:16, 180:9, 182:15, 184:1, 185:9, 185:19, 196:20, 197:4</p> <p><b>complaints</b> [7] - 23:4, 28:25, 49:19, 117:18, 117:19, 120:6, 179:23</p> <p><b>completed</b> [11] - 37:19, 38:22, 39:12, 43:2, 46:22, 47:12, 47:14, 47:17, 147:7, 195:15</p> <p><b>Completely</b> [1] - 163:3</p> <p><b>completely</b> [16] - 20:5, 46:9, 46:10, 56:24, 66:4, 82:19, 90:8, 100:20, 117:11, 140:5, 146:22, 162:24, 163:8, 170:24, 196:22, 209:23</p> <p><b>completion</b> [1] - 141:20</p> <p><b>complex</b> [2] - 84:12, 154:19</p> <p><b>complexities</b> [1] - 38:5</p> <p><b>compliance</b> [1] - 101:22</p> <p><b>complicated</b> [2] - 13:7, 201:23</p> <p><b>complied</b> [2] - 194:4, 194:25</p> <p><b>compliment</b> [1] - 78:12</p> <p><b>components</b> [1] - 118:15</p> <p><b>compressed</b> [2] - 125:9, 125:18</p> <p><b>conceal</b> [1] - 102:12</p> <p><b>concealed</b> [6] - 44:4, 44:9, 111:17, 179:14, 195:13, 196:9</p> <p><b>concealment</b> [2] - 112:1, 112:11</p> <p><b>concede</b> [6] - 72:21,</p>
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<p>98:14, 98:15, 138:12, 150:4, 189:17</p> <p><b>conceded</b> [1] - 12:24</p> <p><b>conceived</b> [1] - 27:12</p> <p><b>concentrated</b> [1] - 208:8</p> <p><b>concept</b> [6] - 15:15, 19:22, 38:22, 39:13, 39:14, 175:15</p> <p><b>concern</b> [4] - 98:17, 98:18, 98:25, 204:11</p> <p><b>concerned</b> [1] - 94:7</p> <p><b>concerning</b> [5] - 16:23, 36:9, 46:4, 67:13, 177:16</p> <p><b>concerns</b> [12] - 85:22, 86:12, 86:15, 87:4, 100:22, 102:2, 102:6, 102:7, 104:6, 105:4, 155:21, 202:11</p> <p><b>concession</b> [1] - 47:8</p> <p><b>concisely</b> [3] - 137:7, 137:8, 185:4</p> <p><b>conclude</b> [7] - 125:1, 127:23, 134:25, 142:24, 144:22, 155:13, 176:14</p> <p><b>concluded</b> [3] - 143:9, 199:17, 208:16</p> <p><b>concludes</b> [8] - 143:23, 153:8, 156:21, 159:25, 205:23, 206:1, 208:1, 210:12</p> <p><b>conclusion</b> [12] - 140:18, 145:25, 179:24, 201:10, 203:2, 203:5, 203:9, 203:12, 205:18, 206:4, 207:3, 209:5</p> <p><b>conclusions</b> [8] - 193:9, 199:7, 200:25, 202:16, 207:12, 207:13, 210:5, 210:7</p> <p><b>conclusive</b> [1] - 199:13</p> <p><b>conclusively</b> [1] - 40:4</p> <p><b>conclusory</b> [2] - 175:6, 179:17</p> <p><b>Concord</b> [1] - 199:1</p> <p><b>concrete</b> [3] - 68:22, 141:5, 142:23</p> <p><b>condition</b> [1] - 141:20</p> <p><b>conditions</b> [3] - 45:25, 142:16, 154:9</p> <p><b>conducive</b> [1] - 208:7</p> <p><b>conduct</b> [10] - 26:18,</p>	<p>112:12, 114:20, 150:2, 160:2, 177:6, 177:9, 195:17, 199:5, 209:3</p> <p><b>conducted</b> [6] - 113:2, 115:6, 119:4, 132:17, 145:25, 149:21</p> <p><b>conducting</b> [1] - 144:13</p> <p><b>conference</b> [10] - 53:9, 53:13, 75:24, 76:6, 80:6, 80:21, 91:8, 101:18, 103:25, 172:10</p> <p><b>conferences</b> [15] - 17:12, 53:8, 53:11, 53:14, 53:16, 75:21, 75:22, 75:24, 76:2, 76:3, 76:4, 76:7, 76:11, 173:19</p> <p><b>confession</b> [1] - 129:23</p> <p><b>confidence</b> [1] - 183:17</p> <p><b>confidential</b> [2] - 24:18, 179:23</p> <p><b>confirmed</b> [3] - 100:11, 100:18, 157:15</p> <p><b>confirming</b> [2] - 106:3, 116:3</p> <p><b>confirms</b> [3] - 30:7, 75:6, 89:4</p> <p><b>conflates</b> [1] - 145:12</p> <p><b>conflict</b> [2] - 176:11, 176:24</p> <p><b>confounding</b> [9] - 153:4, 155:20, 156:5, 156:9, 157:13, 158:3, 196:12, 196:16, 206:12</p> <p><b>confront</b> [1] - 79:23</p> <p><b>confused</b> [1] - 173:25</p> <p><b>confuses</b> [1] - 51:13</p> <p><b>confusion</b> [1] - 176:9</p> <p><b>conjecture</b> [1] - 11:25</p> <p><b>connect</b> [3] - 48:24, 64:12, 189:6</p> <p><b>connected</b> [1] - 65:6</p> <p><b>connection</b> [17] - 25:1, 43:10, 43:12, 86:3, 86:21, 139:18, 140:8, 144:5, 157:7, 159:18, 179:17, 179:23, 189:20, 195:9, 205:22</p> <p><b>conscious</b> [3] - 14:15, 14:17, 199:15</p>	<p><b>consent</b> [2] - 123:20, 123:24</p> <p><b>consequence</b> [2] - 24:16, 160:4</p> <p><b>conservative</b> [3] - 140:2, 140:3, 142:19</p> <p><b>consider</b> [21] - 99:23, 102:5, 102:17, 109:13, 111:7, 111:12, 116:10, 117:22, 122:17, 124:11, 125:5, 125:7, 126:5, 126:19, 133:18, 134:18, 148:5, 155:13, 207:15, 208:14</p> <p><b>consideration</b> [6] - 29:17, 32:6, 116:8, 116:21, 157:13, 206:2</p> <p><b>considerations</b> [1] - 203:22</p> <p><b>considered</b> [16] - 28:14, 31:6, 31:9, 31:12, 31:14, 31:15, 31:18, 32:2, 98:2, 98:9, 117:15, 124:14, 127:4, 168:15, 168:18, 187:2</p> <p><b>considering</b> [5] - 58:13, 117:24, 186:22, 191:2, 208:15</p> <p><b>considers</b> [3] - 14:18, 117:23, 186:25</p> <p><b>consist</b> [1] - 191:25</p> <p><b>consistent</b> [12] - 48:24, 55:3, 55:5, 79:4, 79:9, 79:10, 122:4, 176:1, 176:6, 176:12, 184:22, 188:7</p> <p><b>consistently</b> [1] - 119:16</p> <p><b>consists</b> [1] - 185:3</p> <p><b>conspiracy</b> [18] - 14:23, 14:25, 15:9, 16:20, 19:6, 22:2, 22:3, 22:4, 22:10, 22:11, 55:7, 55:9, 55:12, 57:2, 57:8, 74:24, 163:15, 182:19</p> <p><b>conspire</b> [4] - 11:14, 16:14, 16:19, 19:7</p> <p><b>conspired</b> [1] - 96:7</p> <p><b>constitutes</b> [1] - 119:3</p> <p><b>construction</b> [1] -</p>	<p>23:6</p> <p><b>construe</b> [2] - 128:1, 128:4</p> <p><b>consulted</b> [1] - 173:13</p> <p><b>Consumer</b> [1] - 156:19</p> <p><b>consuming</b> [1] - 84:13</p> <p><b>consummated</b> [1] - 142:7</p> <p><b>contain</b> [1] - 23:5</p> <p><b>contained</b> [1] - 46:6</p> <p><b>contains</b> [5] - 27:16, 46:5, 78:24, 115:22, 208:7</p> <p><b>contemplating</b> [1] - 133:18</p> <p><b>contemplation</b> [1] - 23:23</p> <p><b>contemporaneous</b> [1] - 92:18</p> <p><b>contend</b> [2] - 23:9, 56:23</p> <p><b>content</b> [1] - 25:24</p> <p><b>contention</b> [2] - 147:13, 147:17</p> <p><b>contentions</b> [1] - 149:15</p> <p><b>contest</b> [3] - 150:1, 154:11, 189:9</p> <p><b>contests</b> [1] - 178:14</p> <p><b>context</b> [13] - 47:24, 62:24, 82:25, 83:11, 108:10, 116:22, 120:9, 130:12, 141:10, 148:1, 160:20, 185:25, 189:25</p> <p><b>contingency</b> [1] - 46:11</p> <p><b>contingent</b> [1] - 46:2</p> <p><b>continue</b> [4] - 26:25, 60:25, 77:8, 172:17</p> <p><b>continued</b> [2] - 31:15, 99:18</p> <p><b>CONTINUED</b> [2] - 2:1, 3:1</p> <p><b>continues</b> [1] - 19:11</p> <p><b>contort</b> [2] - 19:10, 47:21</p> <p><b>contorted</b> [1] - 25:17</p> <p><b>contortion</b> [1] - 182:22</p> <p><b>contortionist</b> [1] - 16:8</p> <p><b>contortions</b> [1] - 37:12</p> <p><b>contract</b> [1] - 121:13</p> <p><b>contracts</b> [1] - 124:15</p> <p><b>contractual</b> [1] - 27:9</p> <p><b>contradictory</b> [1] -</p>	<p>146:12</p> <p><b>contrary</b> [13] - 14:24, 33:8, 40:3, 45:9, 67:21, 69:11, 69:13, 95:11, 101:8, 111:10, 130:14, 134:9, 138:23</p> <p><b>contrast</b> [1] - 134:22</p> <p><b>contribute</b> [1] - 49:8</p> <p><b>control</b> [9] - 8:17, 61:16, 61:19, 63:15, 70:3, 164:16, 164:17, 178:14, 178:15</p> <p><b>controlled</b> [2] - 62:12, 62:14</p> <p><b>controlling</b> [5] - 110:10, 149:22, 151:6, 157:1, 175:22</p> <p><b>controls</b> [5] - 103:2, 103:10, 108:24, 149:25, 176:7</p> <p><b>controversial</b> [1] - 18:22</p> <p><b>convenient</b> [1] - 109:11</p> <p><b>conversations</b> [4] - 16:22, 18:14, 28:7, 28:8</p> <p><b>conversion</b> [1] - 60:24</p> <p><b>conveyed</b> [2] - 160:17, 161:4</p> <p><b>convictions</b> [1] - 103:3</p> <p><b>convinced</b> [1] - 39:9</p> <p><b>convincing</b> [5] - 135:25, 184:23, 185:23, 187:4, 200:18</p> <p><b>convolute</b> [1] - 50:9</p> <p><b>convoluted</b> [1] - 55:13</p> <p><b>cooperation</b> [1] - 211:4</p> <p><b>copied</b> [1] - 78:23</p> <p><b>copies</b> [3] - 35:2, 84:18, 84:20</p> <p><b>copy</b> [3] - 50:22, 85:22, 101:1</p> <p><b>corner</b> [1] - 87:16</p> <p><b>Corp</b> [1] - 199:1</p> <p><b>corporate</b> [19] - 10:18, 15:22, 17:10, 42:21, 43:3, 43:8, 63:4, 75:11, 110:19, 110:21, 122:13, 144:16, 159:18, 172:24, 173:5, 178:14, 181:13, 181:16, 201:24</p> <p><b>Corporation</b> [2] -</p>
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<p>37:22, 199:1  <b>corporation</b> [1] - 37:23  <b>correct</b> [5] - 43:7, 150:4, 151:20, 201:13, 211:21  <b>corrected</b> [4] - 148:17, 150:12, 189:5, 189:10  <b>correction</b> [1] - 160:8  <b>Corrections</b> [1] - 186:2  <b>corrective</b> [13] - 48:3, 48:6, 48:25, 50:2, 148:21, 149:17, 150:15, 154:2, 154:15, 160:12, 160:16, 179:5, 190:6  <b>correctly</b> [2] - 35:20, 155:17  <b>correlated</b> [2] - 198:14, 198:17  <b>cortisone</b> [1] - 74:11  <b>cost</b> [2] - 31:18, 74:12  <b>costly</b> [1] - 84:12  <b>Coucke</b> [26] - 62:11, 62:25, 86:16, 86:24, 87:1, 92:7, 92:9, 92:25, 93:1, 95:7, 100:4, 100:18, 100:24, 101:3, 101:7, 101:11, 102:1, 104:19, 105:5, 105:7, 105:17, 165:23, 165:25, 184:5, 187:17, 187:25  <b>Coucke's</b> [1] - 90:17  <b>counsel</b> [19] - 5:10, 5:21, 6:17, 7:2, 35:2, 50:17, 93:24, 96:18, 110:2, 112:14, 115:5, 115:19, 117:1, 122:7, 122:11, 131:10, 131:12, 210:14, 211:3  <b>Counsel</b> [12] - 2:22, 3:5, 35:4, 64:20, 93:22, 139:3, 166:15, 175:12, 183:1, 190:17, 200:1, 210:18  <b>counseling</b> [2] - 100:25, 166:1  <b>counselled</b> [1] - 109:13  <b>count</b> [1] - 40:18  <b>counter</b> [5] - 49:13, 196:19, 196:20,</p>	<p>196:25, 206:13  <b>counterbalance</b> [1] - 160:18  <b>counterfactual</b> [1] - 143:2  <b>counterpart</b> [1] - 98:21  <b>counterparts</b> [2] - 97:16, 112:22  <b>countries</b> [4] - 35:13, 67:3, 89:7, 89:9  <b>country</b> [2] - 72:17, 89:14  <b>country's</b> [1] - 179:10  <b>County</b> [3] - 20:3, 32:17, 124:1  <b>couple</b> [9] - 51:7, 58:12, 102:10, 117:8, 128:2, 129:11, 151:13, 154:1, 187:4  <b>course</b> [35] - 10:3, 10:16, 13:1, 13:24, 16:1, 26:1, 29:5, 30:15, 31:18, 33:18, 33:22, 35:2, 41:1, 45:8, 46:14, 51:16, 52:19, 53:8, 54:9, 55:8, 55:10, 56:4, 64:16, 77:6, 95:14, 98:9, 101:21, 102:17, 109:18, 109:22, 110:24, 135:6, 135:12, 135:19, 175:21  <b>courses</b> [1] - 196:4  <b>Court</b> [65] - 1:24, 8:20, 10:17, 10:22, 12:2, 12:5, 12:22, 22:1, 22:9, 26:9, 26:23, 34:24, 35:1, 35:19, 35:24, 39:5, 42:6, 43:1, 43:17, 45:23, 48:5, 50:12, 65:3, 68:18, 68:19, 74:17, 74:21, 74:22, 74:23, 74:24, 93:18, 99:25, 100:21, 111:2, 116:9, 116:20, 140:21, 171:16, 175:21, 175:23, 176:10, 178:13, 179:11, 180:15, 192:8, 192:10, 192:12, 192:18, 193:8, 193:16, 193:23, 194:3, 194:13, 194:14, 194:16, 194:18, 194:21, 199:13,</p>	<p>199:17, 199:23, 200:17, 201:3, 203:24, 210:21, 211:25  <b>court</b> [15] - 6:15, 6:19, 7:21, 26:13, 26:16, 26:23, 32:20, 55:15, 65:20, 159:8, 171:20, 175:7, 196:4, 210:24, 210:25  <b>COURT</b> [35] - 1:1, 5:7, 5:23, 6:3, 6:6, 6:12, 7:15, 7:17, 35:4, 50:20, 50:23, 64:20, 64:22, 93:22, 94:6, 94:12, 139:3, 151:20, 161:14, 161:20, 166:15, 175:12, 183:1, 188:21, 190:17, 190:20, 190:22, 191:1, 191:4, 191:6, 200:1, 210:18, 210:20, 211:3, 211:19  <b>court's</b> [1] - 16:3  <b>Court's</b> [9] - 8:3, 35:16, 37:20, 116:8, 176:1, 176:3, 194:1, 200:3, 201:12  <b>courtesy</b> [1] - 210:22  <b>Courthouse</b> [1] - 1:10  <b>COURTROOM</b> [6] - 5:5, 94:9, 94:11, 161:17, 161:19, 211:16  <b>courtroom</b> [2] - 171:19, 210:16  <b>courts</b> [6] - 21:15, 23:3, 32:14, 39:17, 110:22, 120:6  <b>Courts</b> [1] - 193:11  <b>covenant</b> [1] - 11:14  <b>cover</b> [3] - 50:25, 65:11, 147:11  <b>covered</b> [3] - 51:25, 65:10, 111:14  <b>covering</b> [1] - 155:11  <b>Craft</b> [1] - 178:17  <b>crazy</b> [1] - 112:5  <b>CRCR</b> [1] - 211:24  <b>cream</b> [3] - 74:11, 74:12, 115:5  <b>create</b> [2] - 19:2, 54:12  <b>created</b> [2] - 118:23, 160:19  <b>creates</b> [2] - 27:23, 209:23  <b>creative</b> [2] - 183:10,</p>	<p>183:11  <b>credentials</b> [1] - 204:6  <b>credibility</b> [7] - 95:22, 97:5, 97:9, 160:18, 161:6, 184:18, 188:17  <b>credible</b> [2] - 184:14, 185:16  <b>credited</b> [1] - 134:8  <b>cries</b> [1] - 182:19  <b>Criminal</b> [1] - 9:18  <b>criminal</b> [10] - 9:23, 25:1, 27:9, 29:10, 55:17, 74:24, 159:6, 162:19, 163:24, 177:17  <b>critical</b> [6] - 26:4, 51:17, 140:16, 156:10, 182:14, 198:1  <b>criticism</b> [3] - 204:15, 206:8, 210:12  <b>criticisms</b> [2] - 88:16, 200:25  <b>criticize</b> [3] - 146:2, 202:23, 205:9  <b>criticizing</b> [1] - 88:20  <b>CROMWELL</b> [1] - 3:2  <b>Cromwell</b> [5] - 6:10, 8:7, 20:23, 20:24, 36:7  <b>cross</b> [1] - 118:24  <b>crowd</b> [1] - 180:8  <b>CROWLEY</b> [1] - 2:21  <b>CROWLEY-BUCK</b> [1] - 2:21  <b>crucial</b> [1] - 108:23  <b>CRUTCHER</b> [1] - 2:20  <b>crystal</b> [3] - 16:19, 176:11, 182:5  <b>culpable</b> [1] - 113:22  <b>culture</b> [1] - 63:4  <b>cure</b> [1] - 95:18  <b>current</b> [4] - 15:19, 17:13, 35:12, 56:1  <b>custodian</b> [1] - 101:15  <b>customer</b> [11] - 31:12, 54:13, 54:15, 74:5, 77:18, 121:16, 121:18, 121:19, 122:3, 132:12, 209:7  <b>customer's</b> [1] - 121:20  <b>customers</b> [6] - 22:8, 32:15, 34:5, 74:5, 120:24, 124:17  <b>cut</b> [2] - 31:13, 95:15  <b>CV</b> [1] - 202:6  <b>CW6</b> [6] - 24:17, 24:20, 25:12, 25:23,</p>	<p>26:2, 119:21  <b>czar</b> [1] - 100:17</p>
<b>D</b>				
<p><b>Daimler</b> [1] - 147:9  <b>damage</b> [5] - 31:14, 44:21, 49:18, 139:25, 140:21  <b>damaged</b> [1] - 140:9  <b>damages</b> [21] - 43:22, 44:2, 44:15, 117:17, 140:2, 140:3, 140:4, 140:5, 140:19, 141:1, 141:6, 142:6, 142:19, 145:10, 147:4, 149:16, 150:7, 178:6, 189:21, 204:3, 206:7  <b>damaging</b> [2] - 47:6, 96:17  <b>damning</b> [1] - 108:9  <b>data</b> [3] - 21:23, 144:18, 201:9  <b>database</b> [1] - 118:23  <b>Date</b> [1] - 211:25  <b>date</b> [14] - 62:4, 71:8, 71:10, 112:14, 141:24, 151:23, 154:12, 155:19, 156:10, 158:5, 158:9, 166:11, 170:13, 173:4  <b>dated</b> [2] - 104:8, 170:1  <b>dates</b> [14] - 49:5, 149:17, 149:18, 149:20, 149:22, 151:19, 153:15, 154:1, 159:25, 160:12, 160:16, 161:4, 189:10, 196:24  <b>Daubert</b> [11] - 7:14, 94:18, 190:19, 190:23, 191:9, 191:13, 199:23, 200:9, 204:1, 207:4, 210:8  <b>DAUBERT</b> [1] - 4:10  <b>DAVID</b> [1] - 2:21  <b>Davis</b> [1] - 6:5  <b>DAVIS</b> [1] - 2:11  <b>days</b> [33] - 37:14, 53:12, 76:12, 76:14, 76:15, 76:16, 85:3, 89:3, 89:21, 90:10, 98:23, 100:3, 101:17, 101:25, 102:13, 103:5,</p>				

<p>103:13, 106:1, 106:16, 106:18, 107:23, 113:1, 127:3, 135:18, 138:1, 138:2, 156:8, 160:9, 207:1, 211:13</p> <p><b>DC</b> [1] - 2:17</p> <p><b>de</b> [1] - 15:4</p> <p><b>de-emphasize</b> [1] - 15:4</p> <p><b>dead</b> [7] - 12:19, 30:2, 30:10, 43:20, 47:5, 181:4</p> <p><b>deal</b> [20] - 35:14, 45:12, 46:10, 46:22, 47:12, 47:14, 48:18, 54:13, 59:23, 97:24, 98:4, 98:6, 98:13, 99:16, 103:15, 129:12, 164:15, 174:18</p> <p><b>dealing</b> [1] - 123:4</p> <p><b>deals</b> [1] - 37:3</p> <p><b>dealt</b> [1] - 123:5</p> <p><b>dearth</b> [1] - 179:19</p> <p><b>death</b> [1] - 47:15</p> <p><b>debated</b> [1] - 99:8</p> <p><b>debunks</b> [1] - 40:24</p> <p><b>decades</b> [1] - 93:10</p> <p><b>deceased</b> [2] - 17:4, 24:21</p> <p><b>deceiving</b> [1] - 85:2</p> <p><b>December</b> [4] - 71:7, 107:17, 174:2</p> <p><b>deceptive</b> [1] - 195:8</p> <p><b>decide</b> [15] - 43:3, 54:14, 74:16, 74:17, 82:18, 138:20, 171:10, 171:18, 171:22, 184:18, 186:16, 188:13, 188:16, 188:17, 211:12</p> <p><b>decided</b> [7] - 37:25, 108:23, 109:2, 109:10, 123:25, 135:1, 174:8</p> <p><b>decides</b> [2] - 116:21, 184:24</p> <p><b>deciding</b> [1] - 98:10</p> <p><b>decision</b> [16] - 17:23, 37:17, 38:9, 38:25, 44:9, 44:12, 54:1, 88:21, 112:17, 134:2, 140:14, 140:15, 178:25, 192:9, 192:12, 211:7</p> <p><b>decision-making</b> [2] - 54:1, 88:21</p> <p><b>decisions</b> [18] - 13:22,</p>	<p>14:3, 30:25, 32:7, 41:11, 53:22, 54:4, 72:8, 75:3, 75:4, 75:8, 75:12, 75:15, 130:22, 130:24, 130:25, 133:23, 172:25</p> <p><b>deck</b> [2] - 78:24, 92:23</p> <p><b>decline</b> [14] - 49:8, 49:15, 49:18, 49:23, 148:15, 149:19, 149:22, 150:14, 151:1, 152:17, 153:15, 189:11</p> <p><b>declined</b> [8] - 32:9, 43:4, 121:13, 148:12, 159:11, 160:9, 209:7, 209:8</p> <p><b>declines</b> [1] - 187:16</p> <p><b>declining</b> [2] - 129:7, 187:23</p> <p><b>decrease</b> [1] - 17:23</p> <p><b>decreased</b> [1] - 69:12</p> <p><b>decreases</b> [2] - 31:2, 33:6</p> <p><b>decree</b> [2] - 123:21, 123:25</p> <p><b>dedicated</b> [1] - 66:19</p> <p><b>deemed</b> [3] - 20:1, 120:11, 123:22</p> <p><b>deep</b> [1] - 108:25</p> <p><b>deeply</b> [1] - 97:9</p> <p><b>defeat</b> [3] - 68:1, 71:5, 174:8</p> <p><b>defeated</b> [1] - 107:6</p> <p><b>defend</b> [1] - 182:12</p> <p><b>Defendant</b> [4] - 2:13, 2:18, 2:22, 3:5</p> <p><b>defendant</b> [9] - 64:17, 93:19, 100:16, 103:25, 133:4, 140:18, 140:22, 145:13, 202:22</p> <p><b>Defendants</b> [1] - 1:9</p> <p><b>defendants</b> [108] - 7:11, 7:23, 7:24, 8:19, 9:1, 14:22, 14:24, 15:17, 16:3, 19:4, 19:5, 24:4, 26:15, 30:16, 32:1, 35:3, 36:2, 37:8, 38:2, 48:14, 50:16, 50:18, 81:10, 81:14, 95:3, 95:7, 95:23, 97:17, 98:14, 104:13, 108:8, 109:5, 110:16, 110:19, 111:14, 112:10, 112:24, 115:8, 117:19,</p>	<p>119:6, 119:12, 120:2, 120:16, 120:17, 121:24, 123:7, 124:16, 125:3, 126:21, 127:20, 128:1, 128:21, 129:3, 129:18, 131:22, 132:14, 132:15, 133:6, 133:17, 133:19, 135:24, 136:3, 137:21, 139:12, 139:15, 139:20, 140:4, 142:15, 143:1, 145:1, 145:5, 146:5, 146:7, 146:12, 147:11, 149:3, 150:1, 150:18, 151:10, 153:17, 154:11, 155:19, 157:3, 157:12, 158:19, 158:22, 160:15, 161:11, 167:2, 177:6, 185:22, 190:11, 194:7, 194:8, 194:21, 194:23, 194:25, 196:9, 202:11, 202:16, 203:8, 204:10, 207:10, 207:18, 208:15, 208:16, 208:23, 209:15</p> <p><b>defendants'</b> [28] - 26:17, 38:4, 95:9, 117:17, 124:21, 130:13, 133:19, 138:21, 140:11, 141:11, 147:17, 148:16, 156:9, 156:22, 160:11, 181:8, 186:5, 186:6, 192:5, 192:7, 192:23, 194:4, 200:6, 200:14, 201:2, 204:24, 209:18, 210:6</p> <p><b>defending</b> [1] - 146:13</p> <p><b>defense</b> [5] - 96:18, 139:13, 142:1, 160:14, 171:22</p> <p><b>defenses</b> [1] - 146:14</p> <p><b>deferred</b> [6] - 27:8, 27:19, 52:18, 115:14, 115:15, 135:20</p> <p><b>deficiencies</b> [1] - 199:6</p> <p><b>defies</b> [1] - 36:25</p>	<p><b>define</b> [1] - 168:16</p> <p><b>defined</b> [1] - 193:25</p> <p><b>definition</b> [4] - 118:17, 195:19, 195:22, 203:12</p> <p><b>defraud</b> [3] - 9:2, 36:5, 38:20</p> <p><b>defrauded</b> [1] - 37:24</p> <p><b>degree</b> [2] - 160:17, 161:5</p> <p><b>Delaware</b> [1] - 147:10</p> <p><b>delay</b> [1] - 158:10</p> <p><b>delayed</b> [3] - 157:19, 158:16, 211:5</p> <p><b>deliberations</b> [1] - 31:23</p> <p><b>deliberative</b> [1] - 95:20</p> <p><b>deliver</b> [2] - 180:23, 181:1</p> <p><b>Delivered</b> [1] - 104:1</p> <p><b>delivered</b> [2] - 170:14, 170:19</p> <p><b>demand</b> [2] - 31:9, 124:4</p> <p><b>demands</b> [1] - 101:12</p> <p><b>demonstrably</b> [1] - 26:7</p> <p><b>demonstrate</b> [5] - 14:10, 40:3, 68:6, 177:3, 198:7</p> <p><b>demonstrated</b> [3] - 30:16, 43:11, 126:17</p> <p><b>demonstrates</b> [4] - 19:15, 31:24, 118:7, 208:17</p> <p><b>demonstrating</b> [1] - 68:20</p> <p><b>demonstrative</b> [2] - 34:22, 34:24</p> <p><b>demonstratively</b> [2] - 33:21, 41:22</p> <p><b>deniability</b> [2] - 135:3, 135:12</p> <p><b>denials</b> [2] - 95:10, 185:22</p> <p><b>denied</b> [3] - 15:20, 179:8, 211:5</p> <p><b>denigrating</b> [1] - 184:5</p> <p><b>deny</b> [1] - 28:9</p> <p><b>denying</b> [1] - 140:20</p> <p><b>depart</b> [1] - 107:10</p> <p><b>department</b> [4] - 24:21, 28:5, 54:17, 86:10</p> <p><b>Department</b> [8] - 9:17, 52:13, 52:19, 117:2, 159:17, 160:24, 186:2, 202:8</p>	<p><b>departments</b> [2] - 74:9, 84:1</p> <p><b>departure</b> [4] - 68:9, 158:5, 168:6, 196:14</p> <p><b>deponent</b> [1] - 15:24</p> <p><b>deponents</b> [1] - 76:18</p> <p><b>depose</b> [1] - 93:12</p> <p><b>deposed</b> [5] - 15:18, 17:14, 52:6, 53:12, 76:18</p> <p><b>deposition</b> [22] - 11:4, 12:25, 15:22, 20:4, 42:7, 46:18, 52:23, 95:13, 95:15, 106:24, 107:4, 107:12, 122:11, 124:24, 134:13, 167:14, 184:15, 185:14, 195:18, 197:14, 197:21, 210:2</p> <p><b>depositions</b> [5] - 20:15, 52:21, 73:25, 74:1</p> <p><b>deprived</b> [3] - 139:21, 143:13, 143:18</p> <p><b>depth</b> [1] - 31:23</p> <p><b>deputy</b> [1] - 210:24</p> <p><b>DEPUTY</b> [6] - 5:5, 94:9, 94:11, 161:17, 161:19, 211:16</p> <p><b>describe</b> [4] - 65:17, 89:6, 116:15, 188:8</p> <p><b>described</b> [20] - 21:8, 95:23, 96:2, 102:21, 102:23, 105:16, 108:7, 124:20, 129:3, 132:8, 135:16, 135:18, 137:7, 138:4, 172:6, 185:4, 186:23, 187:22, 188:9, 207:19</p> <p><b>describing</b> [4] - 105:3, 138:1, 202:2, 203:16</p> <p><b>description</b> [1] - 175:17</p> <p><b>descriptions</b> [1] - 110:23</p> <p><b>deserve</b> [1] - 93:10</p> <p><b>designed</b> [3] - 140:6, 140:7, 140:9</p> <p><b>designee</b> [2] - 15:22, 15:23</p> <p><b>desire</b> [1] - 68:15</p> <p><b>desonide</b> [16] - 28:20, 28:22, 29:3, 29:4, 74:11, 74:12, 115:4, 115:7, 121:17, 127:5, 132:13,</p>
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--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

<p>135:19, 135:21, 135:23</p> <p><b>despite</b> [4] - 127:14, 144:11, 183:20, 209:11</p> <p><b>Despite</b> [1] - 92:21</p> <p><b>detail</b> [8] - 14:2, 48:8, 75:12, 105:9, 142:19, 151:4, 152:20, 152:25</p> <p><b>detailed</b> [7] - 120:12, 125:14, 149:14, 149:15, 152:23, 153:22, 157:9</p> <p><b>details</b> [4] - 91:14, 122:10, 135:3, 195:25</p> <p><b>deteriorated</b> [2] - 98:12, 113:13</p> <p><b>deterioration</b> [1] - 114:17</p> <p><b>determination</b> [1] - 30:20</p> <p><b>determinations</b> [2] - 120:12, 193:19</p> <p><b>determine</b> [6] - 31:2, 59:24, 108:6, 150:3, 199:19, 201:12</p> <p><b>determined</b> [3] - 30:18, 124:2, 153:2</p> <p><b>determining</b> [6] - 71:17, 95:21, 130:16, 195:10, 198:1, 201:9</p> <p><b>developed</b> [5] - 33:21, 57:7, 58:18, 97:23, 104:16</p> <p><b>development</b> [2] - 18:19, 77:25</p> <p><b>developments</b> [1] - 49:4</p> <p><b>deviating</b> [1] - 103:15</p> <p><b>DEVLIN</b> [1] - 3:3</p> <p><b>Devlin</b> [1] - 6:11</p> <p><b>devoid</b> [1] - 20:5</p> <p><b>dialogue</b> [2] - 61:1, 105:11</p> <p><b>dictates</b> [1] - 8:6</p> <p><b>differ</b> [1] - 201:14</p> <p><b>differed</b> [2] - 27:3, 27:7</p> <p><b>difference</b> [6] - 59:11, 142:7, 142:10, 142:13, 150:10, 210:9</p> <p><b>different</b> [18] - 19:18, 34:4, 34:5, 38:24, 40:22, 59:10, 62:15, 64:3, 95:24, 122:22, 139:9, 142:21,</p>	<p>149:3, 150:14, 150:24, 160:12, 186:24, 197:7</p> <p><b>differentiate</b> [1] - 199:10</p> <p><b>differently</b> [1] - 165:12</p> <p><b>difficult</b> [6] - 13:8, 42:4, 73:10, 73:16, 126:11, 161:2</p> <p><b>difficulties</b> [2] - 39:22, 84:13</p> <p><b>difficulty</b> [1] - 146:20</p> <p><b>diligence</b> [3] - 97:18, 109:1, 144:13</p> <p><b>diligent</b> [1] - 170:18</p> <p><b>diluted</b> [1] - 37:3</p> <p><b>direct</b> [20] - 11:7, 11:9, 11:12, 15:15, 16:7, 22:15, 27:1, 52:5, 72:5, 111:1, 111:6, 114:24, 114:25, 115:22, 120:22, 121:2, 160:3, 186:8</p> <p><b>directing</b> [1] - 179:4</p> <p><b>direction</b> [2] - 109:4, 211:12</p> <p><b>directly</b> [2] - 41:6, 134:9</p> <p><b>director</b> [2] - 98:9, 184:10</p> <p><b>directors</b> [2] - 98:2, 105:1</p> <p><b>disaggregate</b> [8] - 49:9, 153:24, 156:5, 158:14, 196:11, 197:7, 206:11, 207:2</p> <p><b>disaggregation</b> [2] - 49:20, 153:6</p> <p><b>disagree</b> [5] - 140:5, 145:1, 153:17, 153:23, 161:9</p> <p><b>disagreement</b> [4] - 97:7, 145:2, 147:19, 205:10</p> <p><b>disagreements</b> [3] - 200:6, 200:24, 201:15</p> <p><b>disagrees</b> [1] - 210:7</p> <p><b>disappointing</b> [3] - 49:13, 49:14</p> <p><b>disavowed</b> [1] - 42:8</p> <p><b>disbelieve</b> [1] - 186:5</p> <p><b>disciplined</b> [1] - 32:24</p> <p><b>disclose</b> [6] - 9:2, 37:9, 39:22, 177:6, 193:24, 194:24</p> <p><b>disclosed</b> [10] - 44:4, 44:19, 46:3, 48:23, 50:14, 151:23, 157:16, 170:8,</p>	<p>174:25, 179:14</p> <p><b>disclosure</b> [29] - 44:8, 48:3, 49:22, 148:18, 148:21, 148:23, 149:17, 151:12, 151:22, 152:18, 153:2, 154:2, 154:8, 154:15, 156:7, 156:10, 160:16, 170:2, 170:4, 189:10, 190:6, 193:21, 194:6, 194:9, 194:14, 194:20, 194:21, 203:11, 203:13</p> <p><b>disclosures</b> [18] - 35:11, 48:6, 48:25, 140:16, 150:15, 150:25, 151:15, 153:13, 153:22, 156:22, 158:20, 158:21, 158:23, 170:20, 179:5, 189:5, 193:18, 201:23</p> <p><b>discovered</b> [1] - 46:2</p> <p><b>discovery</b> [17] - 9:6, 9:10, 11:6, 15:17, 17:6, 20:14, 24:3, 29:12, 30:1, 30:16, 30:22, 34:18, 39:2, 40:15, 93:11, 95:1, 182:11</p> <p><b>discrediting</b> [1] - 34:21</p> <p><b>discuss</b> [9] - 18:2, 20:7, 36:5, 102:2, 102:6, 102:8, 106:18, 109:16, 191:20</p> <p><b>discussed</b> [14] - 15:9, 17:2, 19:18, 34:23, 102:15, 103:7, 104:6, 105:9, 106:17, 107:18, 124:22, 132:16, 197:24, 199:22</p> <p><b>discussing</b> [2] - 42:8, 103:11</p> <p><b>discussion</b> [8] - 31:8, 56:8, 59:3, 86:17, 102:16, 124:9, 192:1, 195:2</p> <p><b>discussions</b> [9] - 17:5, 17:7, 18:5, 18:10, 25:24, 29:18, 32:1, 33:9, 107:23</p> <p><b>disentangled</b> [1] - 156:4</p> <p><b>disgraced</b> [1] - 24:24</p>	<p><b>disheartening</b> [1] - 66:15</p> <p><b>dishonest</b> [1] - 95:22</p> <p><b>dishonesty</b> [1] - 138:18</p> <p><b>dismiss</b> [15] - 26:17, 26:23, 35:16, 37:20, 67:12, 93:17, 130:7, 135:13, 140:13, 176:3, 177:11, 177:17, 182:10, 182:25, 185:9</p> <p><b>dismissal</b> [3] - 10:12, 26:12, 37:23</p> <p><b>dismissed</b> [5] - 8:2, 35:20, 50:6, 57:5, 137:2</p> <p><b>dismissing</b> [1] - 75:17</p> <p><b>dispute</b> [10] - 12:23, 23:7, 27:6, 42:23, 51:8, 51:11, 119:17, 123:7, 127:21</p> <p><b>disputed</b> [2] - 97:9, 179:19</p> <p><b>disputes</b> [3] - 118:16, 118:18, 118:20</p> <p><b>disregard</b> [1] - 79:23</p> <p><b>disregarded</b> [1] - 73:20</p> <p><b>dissemination</b> [1] - 208:10</p> <p><b>distaste</b> [1] - 32:11</p> <p><b>distilled</b> [1] - 34:20</p> <p><b>distinct</b> [4] - 14:20, 138:17, 158:22, 196:22</p> <p><b>Distinguish</b> [1] - 199:15</p> <p><b>distinguished</b> [2] - 122:25, 123:1</p> <p><b>distinguishes</b> [1] - 57:13</p> <p><b>distribute</b> [1] - 35:2</p> <p><b>distributed</b> [2] - 89:13, 106:3</p> <p><b>distribution</b> [4] - 40:7, 40:8, 89:11, 91:18</p> <p><b>distributor</b> [1] - 106:10</p> <p><b>district</b> [8] - 16:2, 26:13, 118:11, 147:10, 148:25, 171:20, 175:7, 179:7</p> <p><b>District</b> [5] - 5:2, 58:9, 110:9, 117:7, 171:16</p> <p><b>DISTRICT</b> [3] - 1:1, 1:1, 1:14</p> <p><b>ditch</b> [1] - 138:3</p> <p><b>divergent</b> [1] - 32:3</p> <p><b>Division</b> [2] - 9:18,</p>	<p>206:13</p> <p><b>division</b> [7] - 15:18, 46:21, 96:14, 130:10, 133:25, 157:18, 206:13</p> <p><b>divisions</b> [1] - 157:18</p> <p><b>divorce</b> [3] - 186:17, 187:13, 187:14</p> <p><b>DOA</b> [1] - 12:19</p> <p><b>doctor</b> [1] - 209:19</p> <p><b>doctrine</b> [6] - 42:22, 43:4, 43:5, 43:8, 43:9, 110:22</p> <p><b>document</b> [52] - 20:4, 23:23, 24:1, 45:24, 52:8, 59:19, 60:13, 60:20, 60:21, 62:3, 63:20, 63:21, 64:2, 73:5, 73:6, 73:14, 73:21, 73:22, 76:25, 78:17, 85:10, 86:5, 86:6, 87:6, 87:8, 88:8, 89:18, 89:21, 89:23, 101:16, 108:10, 108:11, 109:5, 109:7, 109:8, 113:15, 116:12, 116:13, 128:2, 159:9, 165:21, 165:23, 165:24, 166:18, 166:19, 169:13, 169:16, 169:22, 170:1, 175:22, 176:8</p> <p><b>documented</b> [9] - 97:24, 98:7, 99:9, 99:19, 102:16, 107:24, 116:4, 119:24, 133:3</p> <p><b>documents</b> [51] - 17:9, 25:16, 32:8, 40:3, 51:12, 51:14, 55:2, 55:4, 58:18, 58:22, 58:24, 59:20, 65:12, 65:13, 65:15, 65:17, 67:4, 72:12, 72:24, 73:1, 73:24, 76:19, 77:4, 84:18, 84:21, 85:14, 92:2, 93:6, 95:7, 95:9, 99:10, 101:14, 103:19, 104:3, 111:9, 121:12, 121:25, 127:3, 127:13, 137:23, 138:1, 138:22, 165:13, 165:18, 166:25, 167:1, 169:11, 176:9, 182:14, 187:7,</p>
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<p>211:11  <b>DOJ</b> [14] - 9:23, 10:3, 27:3, 28:11, 28:13, 29:9, 29:11, 29:14, 29:17, 29:20, 29:22, 30:2, 30:7, 160:3  <b>dollar</b> [3] - 29:6, 36:17, 89:12  <b>dollars</b> [2] - 20:14, 124:19  <b>domestic</b> [3] - 112:21, 113:3, 113:5  <b>done</b> [26] - 10:18, 12:14, 12:15, 12:16, 12:17, 34:14, 51:18, 60:8, 78:5, 78:9, 78:20, 91:9, 93:13, 97:12, 106:11, 119:10, 145:22, 146:9, 147:13, 147:16, 166:12, 170:23, 172:16, 181:14, 181:19, 190:10  <b>doom</b> [1] - 49:1  <b>door</b> [3] - 43:20, 117:3, 180:19  <b>doubled</b> [2] - 171:6, 171:8  <b>doubt</b> [3] - 38:22, 82:13, 82:14  <b>doubts</b> [1] - 30:8  <b>Doug</b> [3] - 54:4, 54:16, 133:24  <b>Douglas</b> [1] - 25:21  <b>Dow</b> [1] - 191:9  <b>down</b> [17] - 20:9, 22:13, 26:25, 37:18, 42:20, 49:12, 49:22, 96:1, 96:5, 154:13, 158:18, 168:11, 171:6, 171:8, 179:7, 190:24, 200:18  <b>dozens</b> [3] - 119:22, 136:3, 136:8  <b>DPA</b> [3] - 27:18, 27:20, 28:19  <b>DPAs</b> [1] - 29:19  <b>Dr</b> [48] - 46:15, 47:10, 49:3, 49:20, 50:1, 143:7, 143:22, 145:24, 146:3, 146:7, 147:12, 147:19, 149:15, 149:21, 150:2, 150:23, 152:19, 153:7, 155:25, 156:21, 157:9, 157:20, 159:25, 160:9, 195:1, 195:4,</p>	<p>195:17, 195:18, 196:6, 196:10, 196:11, 196:13, 197:2, 200:20, 204:2, 204:10, 204:12, 204:13, 205:2, 205:15, 206:17, 209:19, 209:20, 210:1, 210:4, 210:7  <b>draft</b> [2] - 106:2, 133:4  <b>drama</b> [5] - 56:2, 56:14, 56:16, 131:16, 163:13  <b>draw</b> [11] - 97:2, 99:24, 100:1, 107:20, 110:3, 110:15, 138:21, 138:22, 171:9, 173:17, 173:20  <b>drawing</b> [2] - 108:12, 109:24  <b>drawn</b> [9] - 54:22, 95:7, 95:12, 96:20, 97:7, 101:9, 102:18, 128:18, 170:25  <b>dream</b> [1] - 122:20  <b>drift</b> [1] - 162:21  <b>Drive</b> [1] - 1:18  <b>drive</b> [1] - 52:10  <b>driven</b> [3] - 32:3, 36:24, 96:13  <b>driver</b> [1] - 108:22  <b>drop</b> [7] - 126:1, 151:7, 151:12, 156:24, 157:2, 189:3, 197:3  <b>dropped</b> [2] - 155:10, 155:21  <b>drops</b> [4] - 159:15, 174:24, 175:4, 188:25  <b>drove</b> [1] - 174:20  <b>Drug</b> [1] - 73:10  <b>drug</b> [42] - 9:15, 13:4, 13:12, 21:24, 28:20, 31:21, 35:13, 48:18, 49:11, 56:13, 67:13, 73:16, 96:13, 111:14, 111:16, 111:19, 113:5, 113:25, 117:16, 121:4, 124:19, 124:23, 126:7, 126:14, 127:21, 127:23, 129:21, 130:6, 130:10, 131:23, 131:25, 132:18, 133:21, 133:23, 133:25,</p>	<p>137:15, 159:7, 159:19, 160:23, 173:4, 183:18, 188:8  <b>drugs</b> [40] - 8:25, 9:4, 10:3, 11:22, 12:11, 14:8, 18:21, 20:8, 25:7, 25:9, 28:19, 33:17, 34:11, 44:20, 49:7, 111:15, 111:21, 112:10, 112:18, 112:19, 112:21, 113:19, 114:18, 121:7, 125:22, 126:10, 126:16, 127:12, 129:1, 129:10, 131:13, 134:15, 135:22, 137:13, 137:16, 197:13, 198:12, 208:6, 209:14  <b>due</b> [10] - 77:25, 97:18, 109:1, 121:15, 124:3, 130:23, 144:13, 188:1, 197:4, 197:5  <b>dumb</b> [2] - 164:9, 183:6  <b>dumping</b> [3] - 107:11, 123:22  <b>Dunn</b> [6] - 6:8, 8:7, 20:24, 36:6, 65:4  <b>DUNN</b> [2] - 2:20, 5:3  <b>Dura</b> [1] - 43:16  <b>DURA</b> [1] - 43:17  <b>during</b> [34] - 12:24, 15:17, 15:22, 17:6, 17:21, 18:7, 30:16, 37:25, 42:7, 60:15, 61:3, 69:11, 69:13, 69:14, 69:17, 69:20, 69:21, 70:22, 71:8, 71:20, 80:14, 83:13, 98:5, 135:16, 137:24, 159:3, 159:10, 168:11, 178:20, 184:10, 190:2, 195:18, 197:13, 197:21  <b>duty</b> [2] - 164:20, 174:12  <b>dynamic</b> [2] - 31:11, 154:21  <b>dynamics</b> [2] - 31:7, 78:25</p>	<p>112:13, 113:7, 133:14, 174:3  <b>earning's</b> [1] - 156:16  <b>earnings</b> [7] - 98:19, 102:12, 102:13, 152:1, 152:13, 155:2, 158:9  <b>ears</b> [1] - 173:17  <b>earth</b> [1] - 74:1  <b>easiest</b> [1] - 43:19  <b>easily</b> [4] - 125:23, 136:11, 136:12, 183:5  <b>easy</b> [2] - 93:5, 182:24  <b>EBIT</b> [1] - 99:15  <b>EC</b> [1] - 102:3  <b>ECF</b> [1] - 137:9  <b>echo</b> [1] - 58:3  <b>eclipsed</b> [1] - 143:21  <b>eclipses</b> [1] - 143:16  <b>economic</b> [6] - 143:25, 144:23, 149:20, 199:4, 204:21, 206:3  <b>economically</b> [1] - 143:23  <b>economics</b> [1] - 132:1  <b>economist</b> [3] - 204:6, 204:25, 206:21  <b>educated</b> [1] - 204:5  <b>Educational</b> [1] - 193:16  <b>Edward</b> [1] - 27:15  <b>effect</b> [8] - 54:25, 125:6, 153:11, 156:5, 157:13, 175:19, 205:1, 205:2  <b>effective</b> [2] - 84:2, 84:4  <b>effectively</b> [4] - 40:5, 90:16, 100:16, 160:18  <b>effects</b> [1] - 196:12  <b>effectuate</b> [1] - 140:6  <b>effort</b> [12] - 19:10, 22:17, 24:12, 27:12, 29:16, 47:2, 47:8, 50:12, 53:3, 162:7, 179:22, 181:7  <b>efforts</b> [9] - 8:1, 13:22, 16:10, 21:15, 22:1, 22:11, 24:6, 32:4, 211:14  <b>egg</b> [1] - 145:15  <b>eight</b> [3] - 15:18, 15:19, 51:2  <b>Eighth</b> [1] - 199:2  <b>either</b> [12] - 18:1, 96:9, 97:13, 110:7, 114:10, 131:4,</p>	<p>131:17, 161:10, 192:19, 192:20, 200:11  <b>elasticity</b> [1] - 208:9  <b>Elcock</b> [1] - 191:17  <b>element</b> [3] - 49:1, 110:1, 133:17  <b>elements</b> [3] - 8:4, 51:17, 208:7  <b>Eleventh</b> [1] - 199:9  <b>eliminate</b> [1] - 92:17  <b>eliminating</b> [2] - 39:18, 39:19  <b>elsewhere</b> [1] - 89:14  <b>email</b> [23] - 59:1, 59:14, 61:6, 61:9, 61:12, 61:21, 62:25, 63:2, 67:4, 73:7, 78:23, 85:11, 85:20, 85:21, 86:8, 90:7, 99:14, 102:10, 105:21, 121:15, 121:18, 132:8, 132:9  <b>emailed</b> [1] - 92:13  <b>emails</b> [10] - 17:9, 32:8, 32:21, 33:1, 33:3, 86:11, 98:11, 103:14, 210:2  <b>embarrassed</b> [1] - 180:14  <b>embedded</b> [1] - 149:1  <b>embodies</b> [1] - 114:25  <b>embrace</b> [1] - 72:24  <b>emphasize</b> [3] - 15:4, 109:19, 150:16  <b>emphasized</b> [1] - 16:20  <b>employ</b> [1] - 40:11  <b>employee</b> [8] - 17:2, 17:4, 17:13, 24:10, 24:21, 24:25, 27:14, 41:1  <b>employees</b> [11] - 9:20, 16:21, 16:25, 17:7, 17:20, 18:10, 18:15, 52:17, 61:22, 170:18, 192:14  <b>empty</b> [1] - 146:16  <b>encounter</b> [1] - 170:6  <b>encourage</b> [1] - 169:19  <b>encroaches</b> [1] - 194:1  <b>end</b> [13] - 15:10, 68:21, 76:22, 100:7, 103:3, 105:20, 106:4, 106:12, 107:22, 121:21, 138:14, 173:2, 205:12</p>
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## E

**E.D** [1] - 97:1  
**early** [5] - 107:17,



<p><b>endeavor</b> [1] - 211:7</p> <p><b>ended</b> [1] - 155:18</p> <p><b>ending</b> [1] - 36:21</p> <p><b>Endo</b> [1] - 39:15</p> <p><b>enforcement</b> [3] - 72:17, 117:9, 120:13</p> <p><b>engage</b> [2] - 69:10, 144:12</p> <p><b>engaged</b> [7] - 8:23, 14:13, 105:19, 112:5, 136:1, 209:11, 209:17</p> <p><b>engaging</b> [1] - 209:3</p> <p><b>enjoining</b> [1] - 179:6</p> <p><b>enormous</b> [3] - 63:16, 104:18, 135:2</p> <p><b>ensue</b> [1] - 145:10</p> <p><b>ensure</b> [2] - 140:7, 142:2</p> <p><b>enter</b> [4] - 13:8, 14:23, 37:6, 135:14</p> <p><b>entered</b> [3] - 37:6, 69:24, 145:23</p> <p><b>enterprise</b> [1] - 10:10</p> <p><b>enters</b> [1] - 71:6</p> <p><b>entire</b> [9] - 52:11, 52:14, 76:19, 80:22, 126:2, 164:23, 171:13, 179:10, 182:22</p> <p><b>entirely</b> [4] - 17:12, 64:4, 79:3, 145:18</p> <p><b>entirety</b> [3] - 57:18, 136:24, 197:3</p> <p><b>entitled</b> [7] - 62:3, 107:20, 109:12, 111:7, 117:5, 125:5, 211:22</p> <p><b>entry</b> [2] - 13:3, 13:14</p> <p><b>environment</b> [14] - 73:10, 73:15, 111:20, 128:25, 129:2, 129:15, 130:7, 132:3, 133:11, 133:15, 137:15, 183:16, 183:20, 209:25</p> <p><b>EOC</b> [1] - 176:10</p> <p><b>episodes</b> [1] - 72:10</p> <p><b>epitomizes</b> [2] - 171:13, 171:25</p> <p><b>equal</b> [2] - 16:20, 178:2</p> <p><b>equally</b> [4] - 105:13, 114:6, 127:20, 130:15</p> <p><b>equals</b> [1] - 44:22</p> <p><b>equipment</b> [1] - 210:23</p> <p><b>equivalent</b> [1] -</p>	<p>141:18</p> <p><b>equivocally</b> [1] - 160:15</p> <p><b>erase</b> [1] - 128:3</p> <p><b>Erie</b> [3] - 20:3, 32:17, 124:1</p> <p><b>Ernst</b> [3] - 106:22, 106:25, 107:1</p> <p><b>errata</b> [3] - 47:3, 47:15, 180:4</p> <p><b>error</b> [1] - 188:15</p> <p><b>erupted</b> [2] - 62:19, 100:4</p> <p><b>especially</b> [5] - 12:7, 97:10, 111:5, 127:10, 175:7</p> <p><b>espouse</b> [1] - 200:11</p> <p><b>ESQUIRE</b> [14] - 1:18, 2:3, 2:3, 2:7, 2:8, 2:11, 2:15, 2:15, 2:16, 2:16, 2:20, 2:21, 3:3, 3:3</p> <p><b>essentially</b> [4] - 36:19, 58:1, 172:15, 205:9</p> <p><b>establish</b> [3] - 83:3, 118:8, 203:7</p> <p><b>established</b> [3] - 118:12, 153:25, 160:8</p> <p><b>establishes</b> [1] - 140:21</p> <p><b>establishing</b> [1] - 141:5</p> <p><b>et</b> [3] - 1:8, 105:2, 117:8</p> <p><b>ethereal</b> [1] - 18:6</p> <p><b>ethical</b> [1] - 146:19</p> <p><b>ethics</b> [1] - 203:13</p> <p><b>EU</b> [7] - 39:24, 40:1, 40:25, 42:1, 42:3, 42:4, 42:10</p> <p><b>EU-based</b> [1] - 42:10</p> <p><b>Europe</b> [5] - 40:6, 89:7, 89:8, 89:10, 89:12</p> <p><b>European</b> [7] - 10:10, 35:13, 36:18, 39:24, 59:9, 59:17, 154:10</p> <p><b>European-owned</b> [1] - 35:13</p> <p><b>Euros</b> [2] - 63:23, 97:21</p> <p><b>evaluate</b> [1] - 196:7</p> <p><b>evaluation</b> [2] - 158:12, 195:11</p> <p><b>evaporating</b> [1] - 132:24</p> <p><b>evening</b> [1] - 159:20</p> <p><b>event</b> [5] - 17:22, 43:6, 150:3, 181:7</p>	<p><b>events</b> [12] - 16:12, 16:13, 17:18, 17:24, 20:7, 25:1, 135:16, 181:3, 181:6, 190:3, 190:11, 196:12</p> <p><b>Evidence</b> [6] - 23:5, 23:11, 117:13, 118:4, 120:4, 191:9</p> <p><b>evidence</b> [184] - 9:13, 9:25, 11:7, 11:9, 11:11, 11:12, 14:22, 14:23, 14:25, 15:8, 15:11, 15:15, 15:16, 16:7, 16:9, 16:21, 16:22, 16:25, 17:2, 17:7, 18:8, 19:2, 19:9, 19:11, 20:5, 20:9, 22:14, 22:15, 23:11, 25:13, 25:16, 26:2, 26:21, 27:1, 28:7, 29:16, 29:18, 30:11, 33:2, 34:6, 34:19, 34:21, 37:16, 39:25, 45:9, 52:2, 52:4, 54:7, 66:2, 67:21, 68:7, 68:12, 68:16, 69:8, 71:19, 71:25, 72:1, 72:3, 72:5, 72:6, 72:13, 72:22, 72:24, 73:12, 73:19, 74:1, 74:15, 74:24, 75:1, 75:15, 75:20, 76:1, 76:5, 76:7, 77:18, 79:13, 79:22, 81:5, 83:1, 91:22, 92:18, 93:6, 93:12, 93:14, 95:11, 95:24, 96:20, 96:25, 97:6, 97:11, 97:13, 100:22, 101:7, 101:8, 104:16, 108:5, 108:9, 108:15, 108:19, 109:22, 109:24, 110:3, 110:24, 111:1, 111:6, 111:12, 112:12, 112:24, 114:19, 114:24, 114:25, 115:7, 115:22, 116:3, 116:15, 117:6, 117:14, 118:12, 120:16, 120:22, 120:25, 121:2, 121:3, 121:8, 122:5, 122:18, 123:19, 124:7, 125:20, 126:5, 126:6, 129:22, 130:17, 133:19, 133:21, 134:9,</p>	<p>136:12, 138:5, 138:23, 143:5, 144:22, 149:14, 150:6, 159:23, 160:6, 162:6, 162:10, 162:16, 163:22, 164:4, 169:20, 170:25, 171:21, 172:1, 173:3, 173:14, 173:15, 174:4, 177:8, 177:12, 179:19, 179:25, 180:19, 180:20, 181:9, 186:7, 186:8, 186:9, 188:18, 202:12, 208:17, 208:24, 209:5, 209:7, 209:21, 209:25</p> <p><b>evident</b> [1] - 58:25</p> <p><b>evidentiary</b> [1] - 37:11</p> <p><b>eviscerated</b> [1] - 66:5</p> <p><b>exact</b> [15] - 33:9, 102:22, 125:10, 128:7, 128:11, 129:5, 129:8, 131:14, 131:15, 133:13, 134:5, 137:3, 180:8, 192:17, 193:10</p> <p><b>exactly</b> [13] - 15:13, 17:14, 33:8, 56:3, 62:25, 81:23, 82:8, 86:7, 96:21, 122:5, 144:19, 166:21, 187:15</p> <p><b>examine</b> [1] - 209:24</p> <p><b>examined</b> [2] - 49:16, 125:13</p> <p><b>examining</b> [1] - 159:4</p> <p><b>example</b> [19] - 12:8, 12:10, 20:2, 20:20, 24:1, 39:3, 48:10, 91:13, 92:5, 93:3, 117:25, 121:14, 126:24, 127:15, 128:25, 130:19, 148:19, 196:13, 198:11</p> <p><b>examples</b> [5] - 13:4, 151:13, 166:23, 192:4, 209:2</p> <p><b>exceeding</b> [1] - 127:17</p> <p><b>exceeds</b> [1] - 205:23</p> <p><b>except</b> [1] - 147:3</p> <p><b>exception</b> [5] - 23:9, 23:10, 23:22, 120:3, 179:25</p>	<p><b>excerpted</b> [3] - 84:6, 90:21, 172:3</p> <p><b>Exchange</b> [3] - 8:15, 139:17, 202:8</p> <p><b>exchange</b> [2] - 101:3, 141:15</p> <p><b>excited</b> [1] - 61:23</p> <p><b>exclude</b> [6] - 6:23, 193:10, 199:23, 202:19, 203:25, 210:8</p> <p><b>excluded</b> [14] - 50:1, 146:3, 180:1, 192:10, 192:17, 192:18, 192:21, 192:22, 193:6, 193:11, 194:18, 194:22, 202:6, 207:4</p> <p><b>excludes</b> [1] - 118:4</p> <p><b>excluding</b> [1] - 200:8</p> <p><b>exclusion</b> [5] - 7:8, 8:12, 192:8, 193:12, 199:9</p> <p><b>exclusive</b> [1] - 184:19</p> <p><b>exclusively</b> [1] - 43:23</p> <p><b>excruciating</b> [1] - 152:19</p> <p><b>excuse</b> [2] - 46:9, 49:5</p> <p><b>execute</b> [1] - 160:24</p> <p><b>executed</b> [2] - 27:13, 159:17</p> <p><b>execution</b> [1] - 159:22</p> <p><b>executive</b> [14] - 25:20, 26:3, 41:6, 41:8, 70:1, 75:8, 75:13, 100:4, 102:3, 108:25, 115:23, 134:12, 138:9, 155:1</p> <p><b>executives</b> [5] - 29:18, 38:12, 86:16, 111:9, 139:15</p> <p><b>exercise</b> [2] - 32:2, 113:10</p> <p><b>exercising</b> [1] - 201:3</p> <p><b>exhibit</b> [12] - 11:3, 41:25, 74:2, 74:4, 105:20, 106:12, 107:12, 113:7, 113:15, 113:17, 127:6, 209:14</p> <p><b>Exhibit</b> [74] - 45:20, 73:2, 73:6, 73:9, 74:4, 97:22, 98:6, 98:13, 98:20, 99:5, 99:19, 101:1, 101:2, 101:24, 102:4, 102:13, 102:16, 102:24, 103:4, 103:8, 103:17, 103:23, 104:4,</p>
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<p>104:10, 105:3, 105:12, 105:25, 106:4, 106:19, 107:4, 107:13, 107:15, 107:24, 108:4, 108:22, 109:4, 109:21, 113:12, 115:10, 115:14, 115:21, 116:2, 119:25, 121:22, 122:16, 124:20, 124:22, 124:24, 125:14, 127:2, 127:15, 128:8, 129:1, 130:19, 131:10, 132:8, 132:13, 132:20, 132:22, 133:3, 133:12, 134:7, 134:16, 135:18, 138:14, 169:12, 169:13, 187:20, 187:21, 187:25, 203:14, 208:5</p> <p><b>Exhibits</b> [1] - 121:10 <b>exhibits</b> [3] - 92:12, 114:15, 132:23 <b>exist</b> [2] - 51:1, 169:23 <b>existed</b> [3] - 16:5, 52:3, 185:5 <b>existence</b> [2] - 14:5, 14:15 <b>exists</b> [3] - 177:1, 209:5, 209:10 <b>exonerated</b> [2] - 117:5, 117:12 <b>expand</b> [2] - 175:16, 185:2 <b>expansion</b> [1] - 188:10 <b>expect</b> [2] - 185:7, 186:17 <b>expectations</b> [3] - 97:25, 151:25, 156:15 <b>expected</b> [10] - 14:7, 38:5, 99:18, 106:12, 113:14, 114:18, 136:16, 152:7, 152:9, 158:1 <b>expecting</b> [1] - 189:4 <b>expensive</b> [7] - 9:10, 13:7, 31:20, 34:18, 77:25, 122:8 <b>experience</b> [6] - 19:6, 47:1, 77:23, 123:10, 202:1, 209:15 <b>expert</b> [58] - 6:23, 12:24, 46:15, 46:16,</p>	<p>46:22, 47:20, 53:6, 56:10, 72:11, 75:22, 75:23, 117:16, 117:17, 117:25, 121:6, 124:20, 124:21, 125:12, 126:15, 142:18, 143:5, 143:7, 144:7, 145:24, 146:2, 147:12, 150:2, 189:7, 191:8, 191:22, 191:24, 192:1, 192:15, 193:9, 193:12, 193:25, 194:19, 194:23, 194:24, 195:24, 196:1, 196:5, 197:7, 197:10, 199:9, 199:24, 200:11, 200:17, 201:5, 202:7, 204:3, 204:8, 204:16, 204:19, 205:6, 209:19, 210:3, 210:6</p> <p><b>expert's</b> [9] - 47:17, 147:18, 191:12, 191:13, 194:3, 199:2, 199:6, 199:14, 199:18 <b>expertise</b> [8] - 91:4, 91:14, 91:17, 104:23, 104:25, 106:23, 191:17, 195:17 <b>expertised</b> [1] - 105:23 <b>experts</b> [16] - 7:14, 8:13, 117:15, 125:11, 161:12, 180:1, 191:15, 191:19, 193:17, 200:6, 200:8, 200:15, 201:8, 201:14, 203:17, 208:3 <b>experts'</b> [3] - 150:3, 200:24, 201:8 <b>expired</b> [2] - 29:21, 141:19 <b>explain</b> [13] - 28:1, 28:4, 48:8, 79:25, 80:4, 80:6, 82:4, 84:24, 90:6, 133:6, 197:21, 208:22, 210:13 <b>explained</b> [11] - 14:18, 38:9, 59:8, 91:23, 130:12, 156:17, 192:12, 198:3,</p>	<p>199:13, 209:1, 209:6 <b>explaining</b> [2] - 62:25, 194:22 <b>explains</b> [3] - 81:23, 82:7, 91:15 <b>explanation</b> [2] - 56:5, 119:6 <b>explore</b> [1] - 94:20 <b>exposed</b> [3] - 77:23, 77:24, 105:25 <b>expressed</b> [1] - 98:6 <b>expressly</b> [2] - 132:9, 152:13 <b>extensive</b> [4] - 32:1, 34:17, 121:3, 163:7 <b>extensively</b> [5] - 95:6, 96:16, 99:8, 110:20, 117:1 <b>extent</b> [2] - 200:25, 203:23 <b>external</b> [1] - 106:23 <b>extraordinary</b> [5] - 59:2, 59:6, 59:12, 98:20, 99:1 <b>extrapolating</b> [1] - 118:1 <b>extreme</b> [2] - 68:9, 200:3 <b>Extreme</b> [1] - 105:19 <b>eye</b> [2] - 126:16, 126:23</p>	<p>146:1, 147:3, 147:6, 147:8, 149:10, 149:12, 150:2, 154:25, 157:14, 158:9, 161:3, 162:17, 162:23, 165:15, 169:24, 172:14, 173:18, 174:18, 174:21, 179:21, 185:11, 185:13, 186:12, 197:16, 198:20, 198:21, 198:22, 199:19, 200:13, 205:4, 205:5, 206:1, 207:9, 207:14, 207:15, 208:3, 210:5, 210:7</p> <p><b>factor</b> [8] - 15:3, 15:7, 15:11, 16:4, 53:2, 113:6, 158:11, 198:1 <b>factoring</b> [1] - 102:12 <b>factors</b> [10] - 14:19, 14:22, 15:4, 15:5, 31:1, 149:25, 152:16, 191:13, 197:8, 206:23 <b>factory</b> [2] - 122:9, 125:18 <b>facts</b> [31] - 20:5, 20:15, 27:20, 27:21, 27:22, 44:4, 44:9, 46:11, 71:20, 97:8, 97:9, 98:15, 111:10, 115:19, 115:21, 117:20, 118:1, 124:5, 133:9, 133:10, 141:8, 143:4, 143:22, 146:18, 149:5, 174:7, 191:22, 196:5, 203:3, 203:19, 211:10 <b>factual</b> [6] - 23:13, 23:17, 93:4, 116:24, 118:5, 119:2 <b>factually</b> [4] - 67:17, 67:19, 90:1, 120:10 <b>fail</b> [7] - 8:16, 8:18, 14:14, 44:16, 47:25, 139:24, 142:4 <b>failed</b> [21] - 8:5, 9:9, 10:20, 15:14, 16:4, 16:5, 24:7, 30:15, 32:20, 34:8, 35:24, 37:8, 42:15, 42:18, 83:3, 142:10, 142:12, 149:9, 177:6, 177:9, 179:15 <b>failing</b> [4] - 9:2, 39:22,</p>	<p>142:7, 154:21 <b>fails</b> [6] - 23:15, 49:3, 195:10, 196:6, 196:11, 197:12 <b>failure</b> [8] - 48:24, 49:9, 50:15, 195:11, 197:18, 198:9, 199:14, 199:18 <b>failures</b> [2] - 36:8, 43:16 <b>fair</b> [7] - 24:2, 32:10, 80:17, 122:4, 139:22, 140:14, 144:3 <b>fairly</b> [1] - 143:20 <b>faithfully</b> [1] - 105:1 <b>fall</b> [4] - 120:7, 133:14, 177:12, 178:20 <b>Fall</b> [1] - 68:20 <b>falls</b> [2] - 120:3, 201:13 <b>false</b> [33] - 8:23, 36:4, 36:14, 41:7, 41:22, 42:6, 42:7, 48:15, 66:8, 66:9, 66:14, 66:20, 67:20, 69:15, 69:19, 83:4, 83:5, 84:22, 85:7, 85:18, 91:1, 110:16, 130:2, 139:12, 156:23, 168:24, 178:23, 179:6, 192:23, 193:3, 193:13, 193:15, 203:8 <b>falsely</b> [2] - 131:6, 203:7 <b>falsity</b> [4] - 8:3, 8:8, 51:18, 203:6 <b>familiar</b> [1] - 179:2 <b>family</b> [1] - 36:25 <b>fancy</b> [1] - 106:10 <b>fantasy</b> [1] - 72:2 <b>far</b> [16] - 5:7, 39:7, 45:6, 58:6, 69:1, 74:18, 96:5, 108:7, 114:6, 138:22, 155:1, 155:14, 171:18, 179:8, 190:13, 204:14 <b>Farrington</b> [16] - 62:18, 86:9, 86:22, 88:12, 92:13, 92:14, 92:19, 92:21, 100:11, 100:18, 100:24, 102:25, 108:20, 169:17, 187:22 <b>Farrington's</b> [3] - 88:8, 100:12, 109:1 <b>fashion</b> [1] - 160:10</p>
<b>F</b>				
<p><b>F.3d</b> [1] - 118:2 <b>face</b> [3] - 27:7, 55:1, 170:4 <b>faced</b> [1] - 53:3 <b>facility</b> [2] - 31:21 <b>facing</b> [2] - 56:25, 125:24 <b>fact</b> [85] - 11:4, 13:11, 13:19, 19:7, 23:7, 27:24, 28:17, 30:3, 34:16, 41:9, 42:3, 42:23, 46:5, 46:6, 54:8, 55:10, 56:19, 56:25, 64:2, 64:5, 65:20, 68:24, 70:21, 81:18, 88:24, 92:14, 94:22, 100:18, 104:3, 104:17, 109:25, 111:20, 116:20, 117:10, 118:9, 119:8, 119:13, 121:4, 126:3, 126:6, 126:23, 136:21, 143:8, 143:21, 143:25, 144:1,</p>				

<p><b>fast</b> [4] - 57:5, 70:14, 169:14, 210:25</p> <p><b>fatal</b> [1] - 47:7</p> <p><b>fated</b> [1] - 22:17</p> <p><b>favor</b> [9] - 95:13, 97:2, 100:1, 101:10, 108:12, 109:24, 114:4, 128:19, 167:1</p> <p><b>FCC</b> [1] - 70:2</p> <p><b>FDA</b> [3] - 13:7, 125:20, 125:21</p> <p><b>fear</b> [1] - 181:24</p> <p><b>features</b> [8] - 34:9, 208:1, 208:25, 209:13, 209:14, 209:24, 210:11, 210:13</p> <p><b>February</b> [11] - 24:25, 59:14, 79:25, 84:7, 84:9, 98:11, 98:24, 126:24, 151:22, 153:1, 153:25</p> <p><b>federal</b> [3] - 72:16, 83:14, 123:23</p> <p><b>FEDERAL</b> [1] - 211:19</p> <p><b>Federal</b> [7] - 23:5, 23:11, 117:13, 118:3, 120:4, 120:7, 191:9</p> <p><b>Felix</b> [1] - 119:16</p> <p><b>fell</b> [2] - 152:15, 156:25</p> <p><b>fellow</b> [2] - 26:2, 186:6</p> <p><b>fellows</b> [1] - 180:25</p> <p><b>felt</b> [1] - 71:14</p> <p><b>fend</b> [1] - 68:16</p> <p><b>Ferrellgas</b> [2] - 39:3, 39:4</p> <p><b>FERRELLGAS</b> [1] - 39:4</p> <p><b>Fertilizer</b> [1] - 123:20</p> <p><b>few</b> [22] - 8:9, 13:2, 23:16, 24:23, 56:11, 60:22, 86:14, 89:21, 90:9, 97:12, 98:23, 113:16, 120:2, 157:3, 166:23, 169:11, 179:17, 186:1, 202:5, 207:6, 209:2</p> <p><b>fiduciary</b> [1] - 174:12</p> <p><b>fight</b> [2] - 104:20, 174:12</p> <p><b>fighting</b> [5] - 101:12, 104:12, 104:16, 137:25, 138:17</p> <p><b>figure</b> [2] - 58:19, 83:17</p> <p><b>file</b> [1] - 61:22</p> <p><b>filed</b> [3] - 22:19, 29:13,</p>	<p>60:13</p> <p><b>filing</b> [2] - 7:1, 119:8</p> <p><b>filings</b> [4] - 84:6, 84:15, 91:11, 170:21</p> <p><b>final</b> [6] - 32:6, 43:15, 79:12, 91:24, 174:1, 193:20</p> <p><b>finalizing</b> [2] - 59:4, 99:5</p> <p><b>finally</b> [14] - 10:23, 28:18, 66:6, 71:12, 88:5, 90:11, 91:21, 120:15, 127:13, 136:15, 174:23, 186:17, 193:20, 207:6</p> <p><b>finance</b> [6] - 61:8, 98:16, 99:8, 99:14, 103:14, 108:1</p> <p><b>financial</b> [10] - 46:3, 54:17, 62:4, 69:1, 103:10, 151:24, 154:4, 191:23, 201:23, 203:16</p> <p><b>finder</b> [1] - 199:19</p> <p><b>findings</b> [14] - 23:13, 23:18, 106:17, 106:19, 107:3, 116:3, 116:14, 118:5, 118:7, 118:9, 118:24, 119:2, 119:7, 120:22</p> <p><b>fine</b> [6] - 7:15, 7:17, 93:11, 94:5, 153:17, 195:25</p> <p><b>fine-tuned</b> [1] - 195:25</p> <p><b>finished</b> [2] - 61:7, 170:24</p> <p><b>finishes</b> [1] - 77:7</p> <p><b>finishing</b> [1] - 94:8</p> <p><b>Fire</b> [1] - 37:21</p> <p><b>firm</b> [5] - 20:23, 104:25, 151:5, 158:12</p> <p><b>firms</b> [4] - 21:5, 31:8, 164:21, 187:11</p> <p><b>first</b> [44] - 8:22, 10:7, 11:8, 15:4, 18:25, 22:24, 23:17, 36:9, 36:21, 37:13, 47:20, 51:2, 55:23, 62:10, 63:24, 66:11, 66:13, 68:15, 71:9, 71:22, 80:1, 94:19, 107:3, 123:20, 130:4, 148:4, 151:21, 152:4, 156:14, 158:6, 159:16, 161:13, 167:4, 167:9, 167:12,</p>	<p>167:13, 177:22, 181:14, 183:15, 190:6, 191:20, 192:3, 204:17, 207:18</p> <p><b>fiscal</b> [1] - 151:24</p> <p><b>fit</b> [2] - 200:19, 200:21</p> <p><b>fits</b> [1] - 202:9</p> <p><b>five</b> [15] - 29:12, 29:13, 58:22, 61:5, 76:21, 76:23, 101:17, 110:2, 122:19, 129:25, 161:14, 167:6, 169:8, 169:9</p> <p><b>five-minute</b> [1] - 161:14</p> <p><b>fix</b> [7] - 15:1, 16:5, 20:7, 33:17, 96:7, 155:9</p> <p><b>fixed</b> [8] - 10:1, 115:3, 129:24, 135:21, 155:14, 165:12, 165:13, 165:14</p> <p><b>fixing</b> [76] - 9:3, 9:7, 9:12, 9:14, 11:17, 12:19, 12:21, 15:21, 18:22, 20:2, 22:7, 26:16, 26:21, 51:21, 52:1, 52:3, 52:7, 52:9, 53:2, 53:7, 53:9, 54:7, 54:9, 54:23, 55:7, 55:9, 55:12, 55:19, 56:15, 56:16, 57:2, 57:5, 57:8, 57:12, 57:14, 64:11, 66:9, 71:24, 72:1, 72:3, 72:11, 72:14, 73:3, 73:12, 73:17, 73:18, 73:20, 74:2, 74:15, 74:17, 74:19, 74:20, 75:1, 75:21, 76:12, 77:7, 77:19, 117:12, 118:20, 120:23, 135:16, 136:2, 160:5, 160:7, 162:11, 162:14, 162:16, 162:24, 162:25, 163:15, 163:22, 173:21, 182:19, 198:8, 199:13, 209:4</p> <p><b>flag</b> [2] - 59:3, 99:2</p> <p><b>Flat</b> [1] - 122:23</p> <p><b>flat</b> [14] - 23:2, 41:7, 41:21, 47:7, 80:2, 80:8, 80:19, 82:2, 82:12, 127:22, 127:24, 128:13,</p>	<p>171:11, 207:23</p> <p><b>flaws</b> [1] - 200:15</p> <p><b>floor</b> [1] - 7:18</p> <p><b>flow</b> [2] - 63:22, 102:11</p> <p><b>flowing</b> [1] - 140:19</p> <p><b>flows</b> [1] - 158:15</p> <p><b>fly</b> [3] - 102:1, 102:5, 102:7</p> <p><b>focus</b> [13] - 15:3, 18:6, 24:18, 48:10, 54:3, 54:24, 63:20, 77:21, 85:1, 104:17, 156:8, 158:21, 170:18</p> <p><b>focused</b> [3] - 88:14, 90:25, 91:6</p> <p><b>focuses</b> [1] - 15:11</p> <p><b>focusing</b> [2] - 64:8, 84:7</p> <p><b>fold</b> [2] - 74:13, 132:12</p> <p><b>folks</b> [1] - 180:13</p> <p><b>follow</b> [3] - 20:24, 50:22, 206:20</p> <p><b>followed</b> [2] - 56:20, 62:21</p> <p><b>following</b> [7] - 11:9, 29:23, 105:23, 106:15, 107:23, 175:25, 198:14</p> <p><b>Food</b> [2] - 26:10, 26:13</p> <p><b>Foods</b> [13] - 11:11, 12:15, 12:18, 14:1, 16:2, 19:19, 21:8, 26:15, 26:16, 26:23, 122:23, 182:6, 198:4</p> <p><b>footnote</b> [4] - 119:24, 137:1, 186:21, 186:22</p> <p><b>FOR</b> [1] - 1:1</p> <p><b>forecast</b> [1] - 101:23</p> <p><b>forecasting</b> [3] - 59:16, 59:21, 63:10</p> <p><b>forecasts</b> [1] - 59:18</p> <p><b>forego</b> [1] - 108:23</p> <p><b>foregoing</b> [1] - 211:21</p> <p><b>foresee</b> [1] - 116:12</p> <p><b>foreseeable</b> [1] - 160:4</p> <p><b>forever</b> [1] - 181:19</p> <p><b>Form</b> [3] - 84:8, 84:10</p> <p><b>form</b> [9] - 15:21, 68:8, 74:11, 107:11, 116:15, 121:13, 180:2, 188:11</p> <p><b>formal</b> [1] - 208:10</p> <p><b>former</b> [13] - 15:19, 17:4, 17:13, 18:15, 24:10, 24:21, 24:24,</p>	<p>40:11, 52:17, 62:11, 124:22, 124:23</p> <p><b>forming</b> [1] - 117:15</p> <p><b>forms</b> [1] - 148:8</p> <p><b>forth</b> [16] - 15:16, 22:14, 27:22, 72:11, 101:24, 117:20, 118:5, 118:9, 119:23, 120:12, 150:21, 175:25, 183:9, 194:23, 202:6, 205:15</p> <p><b>fortune</b> [2] - 174:10, 174:21</p> <p><b>forty</b> [1] - 142:4</p> <p><b>forum</b> [1] - 14:13</p> <p><b>forward</b> [7] - 38:24, 43:24, 44:13, 45:11, 46:23, 185:10, 205:14</p> <p><b>forwarded</b> [1] - 101:13</p> <p><b>Fougera</b> [2] - 115:2, 115:24</p> <p><b>fought</b> [1] - 139:16</p> <p><b>foundation</b> [4] - 118:8, 118:12, 199:6, 201:6</p> <p><b>founded</b> [1] - 30:9</p> <p><b>four</b> [17] - 8:21, 35:20, 35:23, 41:1, 49:17, 50:6, 57:7, 75:21, 76:7, 91:9, 102:13, 103:5, 106:1, 110:2, 116:23, 136:22, 159:12</p> <p><b>fourth</b> [6] - 71:12, 71:13, 120:15, 134:18, 151:23, 168:10</p> <p><b>FP&amp;A</b> [1] - 62:5</p> <p><b>fraction</b> [1] - 29:6</p> <p><b>frames</b> [1] - 94:8</p> <p><b>Frank</b> [3] - 5:25, 7:22, 20:24</p> <p><b>FRANK</b> [1] - 2:14</p> <p><b>frankly</b> [5] - 9:25, 47:21, 58:25, 107:19, 155:18</p> <p><b>Fraternal</b> [1] - 116:17</p> <p><b>fraud</b> [25] - 29:1, 33:22, 39:7, 39:9, 39:14, 39:20, 56:18, 57:19, 58:5, 58:7, 60:13, 66:14, 83:14, 111:24, 112:1, 153:11, 158:3, 175:2, 175:5, 177:10, 177:11, 188:25, 196:17, 206:5</p>
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<p><b>fraud-related</b> [1] - 196:17</p> <p><b>fraudulent</b> [3] - 45:7, 160:2, 195:8</p> <p><b>free</b> [7] - 6:17, 6:20, 26:23, 113:24, 129:9, 129:19, 186:4</p> <p><b>frequently</b> [2] - 32:9, 121:12</p> <p><b>FRIED</b> [1] - 2:14</p> <p><b>Fried</b> [3] - 5:25, 7:22, 20:24</p> <p><b>Friedman</b> [1] - 39:15</p> <p><b>friends</b> [1] - 65:14</p> <p><b>front</b> [6] - 15:10, 134:16, 171:19, 180:21, 183:12, 185:23</p> <p><b>Full</b> [1] - 194:9</p> <p><b>full</b> [9] - 30:11, 45:16, 92:9, 144:17, 192:6, 194:14, 194:20, 194:21, 203:13</p> <p><b>fullest</b> [1] - 5:7</p> <p><b>fully</b> [3] - 93:1, 104:4, 158:8</p> <p><b>function</b> [1] - 201:3</p> <p><b>functional</b> [1] - 87:4</p> <p><b>functioning</b> [1] - 63:4</p> <p><b>Fund</b> [1] - 39:16</p> <p><b>FUND</b> [1] - 1:3</p> <p><b>fundamental</b> [2] - 34:9, 197:11</p> <p><b>fungible</b> [1] - 208:9</p> <p><b>furious</b> [1] - 105:21</p> <p><b>furthermore</b> [1] - 191:15</p> <p><b>future</b> [2] - 42:24, 172:19</p>	<p>118:22, 119:9, 119:14, 119:18, 119:21, 119:23, 151:2, 173:1</p> <p><b>General</b> [1] - 52:14</p> <p><b>General's</b> [1] - 52:12</p> <p><b>generally</b> [5] - 30:20, 36:6, 129:16, 148:1, 160:14</p> <p><b>generals</b> [1] - 118:19</p> <p><b>generate</b> [1] - 90:23</p> <p><b>generic</b> [76] - 8:24, 10:2, 11:21, 12:11, 13:3, 13:12, 18:21, 20:8, 21:24, 22:20, 33:17, 34:3, 34:7, 44:20, 46:21, 49:7, 49:11, 51:3, 51:16, 67:13, 71:23, 75:4, 77:24, 79:16, 79:18, 96:13, 105:8, 106:10, 111:14, 111:15, 111:16, 111:19, 112:17, 112:19, 112:20, 112:21, 112:22, 113:5, 113:18, 113:25, 114:17, 117:16, 121:7, 124:23, 126:7, 126:10, 126:12, 126:14, 129:1, 129:21, 130:5, 130:10, 131:23, 131:24, 132:18, 133:20, 133:22, 133:24, 134:15, 137:13, 137:15, 156:18, 157:11, 159:1, 159:7, 159:19, 160:23, 163:23, 182:1, 183:18, 188:8, 208:2, 208:6, 209:14, 209:16</p> <p><b>Generic</b> [1] - 121:8</p> <p><b>generics</b> [8] - 77:22, 105:7, 129:14, 157:18, 158:1, 172:13, 207:10, 207:16</p> <p><b>Genni</b> [1] - 74:7</p> <p><b>genuine</b> [1] - 27:24</p> <p><b>geographic</b> [2] - 35:23, 50:6</p> <p><b>GIBSON</b> [1] - 2:20</p> <p><b>Gibson</b> [6] - 6:8, 8:6, 20:23, 20:24, 36:6, 65:4</p> <p><b>Given</b> [1] - 92:15</p>	<p><b>given</b> [12] - 40:19, 49:18, 69:2, 76:16, 90:18, 97:14, 162:6, 175:3, 178:16, 183:3, 187:21, 203:22</p> <p><b>glad</b> [1] - 79:12</p> <p><b>glare</b> [1] - 160:3</p> <p><b>glaring</b> [1] - 48:10</p> <p><b>Glass</b> [1] - 122:23</p> <p><b>global</b> [1] - 32:24</p> <p><b>globe</b> [2] - 102:6, 102:7</p> <p><b>glossed</b> [1] - 96:6</p> <p><b>Gluck</b> [1] - 120:7</p> <p><b>goal</b> [3] - 79:16, 79:17, 80:2</p> <p><b>goals</b> [2] - 59:4, 99:5</p> <p><b>god</b> [1] - 56:16</p> <p><b>Godot</b> [5] - 9:21, 9:22, 29:8, 29:22</p> <p><b>gold</b> [1] - 109:6</p> <p><b>Goldman</b> [1] - 80:21</p> <p><b>Gompers</b> [2] - 117:17, 150:2</p> <p><b>goodman</b> [1] - 172:11</p> <p><b>goods</b> [2] - 31:19</p> <p><b>gotcha</b> [1] - 147:23</p> <p><b>govern</b> [2] - 182:14, 207:12</p> <p><b>governed</b> [3] - 191:8, 193:24, 194:8</p> <p><b>government</b> [2] - 52:12, 120:3</p> <p><b>government's</b> [1] - 158:25</p> <p><b>GPhA</b> [2] - 126:25, 135:17</p> <p><b>grams</b> [1] - 74:12</p> <p><b>grant</b> [1] - 199:23</p> <p><b>granted</b> [7] - 26:16, 50:16, 67:12, 97:6, 118:11, 150:8, 201:9</p> <p><b>grants</b> [1] - 16:3</p> <p><b>granular</b> [1] - 128:9</p> <p><b>grapple</b> [1] - 183:12</p> <p><b>grappling</b> [1] - 71:21</p> <p><b>grave</b> [1] - 47:9</p> <p><b>great</b> [7] - 20:18, 48:8, 60:9, 78:5, 78:9, 78:20, 151:4</p> <p><b>greater</b> [4] - 32:19, 38:5, 96:5, 204:14</p> <p><b>Greenbaum</b> [1] - 6:5</p> <p><b>GREENBAUM</b> [1] - 2:11</p> <p><b>grew</b> [1] - 104:22</p> <p><b>GRONER</b> [6] - 2:16, 4:11, 190:24, 191:2, 191:5, 191:7</p>	<p><b>groner</b> [1] - 206:12</p> <p><b>Groner</b> [8] - 6:1, 7:23, 8:12, 46:16, 49:25, 53:6, 191:7, 202:5</p> <p><b>gross</b> [4] - 125:11, 125:13, 125:17, 182:8</p> <p><b>GROSSMAN</b> [1] - 2:7</p> <p><b>Grossman</b> [1] - 5:14</p> <p><b>ground</b> [1] - 50:25</p> <p><b>grounds</b> [1] - 201:8</p> <p><b>groundwork</b> [1] - 119:10</p> <p><b>group</b> [3] - 46:4, 87:4, 93:24</p> <p><b>grouped</b> [1] - 199:11</p> <p><b>groups</b> [1] - 90:23</p> <p><b>growing</b> [2] - 103:16, 103:22</p> <p><b>growth</b> [11] - 36:10, 36:23, 37:4, 89:5, 89:15, 103:16, 103:22, 155:14, 155:16</p> <p><b>Guam</b> [1] - 117:8</p> <p><b>guess</b> [4] - 95:18, 136:25, 180:21, 189:13</p> <p><b>guesswork</b> [1] - 180:18</p> <p><b>guidance</b> [14] - 104:20, 104:23, 104:25, 105:2, 105:18, 105:20, 106:2, 106:16, 106:20, 106:23, 133:9, 133:10, 156:16, 156:17</p> <p><b>guide</b> [1] - 65:7</p> <p><b>guidelines</b> [1] - 17:1</p> <p><b>guilt</b> [1] - 145:14</p> <p><b>guilty</b> [2] - 26:15, 26:20</p> <p><b>Gumwood</b> [1] - 23:19</p> <p><b>gun</b> [3] - 11:17, 16:16, 110:2</p> <p><b>guns</b> [2] - 11:18, 15:10</p> <p><b>guts</b> [1] - 40:24</p> <p><b>guttled</b> [1] - 136:21</p> <p><b>gutting</b> [1] - 180:5</p> <p><b>guy</b> [6] - 46:15, 88:18, 166:7, 184:6, 184:7, 184:12</p> <p><b>guys</b> [1] - 163:25</p>	<p>24:9, 78:18, 95:4, 146:16, 167:12, 183:5</p> <p><b>halfway</b> [2] - 102:6, 102:7</p> <p><b>hallmark</b> [1] - 14:16</p> <p><b>hallmarks</b> [2] - 13:1, 121:9</p> <p><b>hallway</b> [1] - 41:11</p> <p><b>Halobetasol</b> [1] - 127:6</p> <p><b>hand</b> [4] - 84:17, 87:15, 100:16, 178:7</p> <p><b>hand-picked</b> [1] - 100:16</p> <p><b>Handbook</b> [1] - 121:8</p> <p><b>handed</b> [1] - 85:21</p> <p><b>handful</b> [1] - 159:5</p> <p><b>handle</b> [1] - 74:9</p> <p><b>handled</b> [1] - 178:12</p> <p><b>hang</b> [1] - 194:11</p> <p><b>happy</b> [2] - 93:20, 138:25</p> <p><b>harbor</b> [1] - 35:22</p> <p><b>hard</b> [4] - 71:21, 78:15, 163:20, 169:9</p> <p><b>Hardiman</b> [8] - 6:10, 46:25, 50:24, 86:25, 90:15, 161:21, 183:15, 184:5</p> <p><b>HARDIMAN</b> [7] - 3:3, 4:5, 6:9, 50:21, 50:24, 161:21, 163:3</p> <p><b>Hardiman's</b> [1] - 20:22</p> <p><b>hardly</b> [1] - 169:15</p> <p><b>HARRIS</b> [1] - 2:14</p> <p><b>harrod</b> [1] - 197:2</p> <p><b>HARROD</b> [10] - 2:7, 4:8, 4:12, 5:13, 139:6, 151:21, 161:16, 188:22, 200:2, 208:19</p> <p><b>Harrod</b> [5] - 5:13, 94:17, 139:1, 139:6, 188:19</p> <p><b>Harrod's</b> [1] - 177:21</p> <p><b>Harvard</b> [1] - 189:8</p> <p><b>hat</b> [1] - 100:14</p> <p><b>hats</b> [1] - 100:14</p> <p><b>haves</b> [5] - 108:24, 109:8, 109:9</p> <p><b>head</b> [6] - 32:7, 35:8, 62:11, 100:15, 112:15, 133:24</p> <p><b>headline</b> [1] - 87:18</p> <p><b>headquarters</b> [2] - 159:18, 160:25</p> <p><b>heads</b> [2] - 54:17, 54:21</p> <p><b>heads-up</b> [2] - 54:17,</p>
<b>G</b>				
<p><b>G-P-h-a</b> [1] - 127:2</p> <p><b>GAAP</b> [9] - 59:11, 59:12, 62:5, 63:9, 98:22, 101:22, 165:10, 165:12, 165:18</p> <p><b>gain</b> [1] - 22:1</p> <p><b>Gallagher</b> [1] - 124:24</p> <p><b>games</b> [1] - 129:12</p> <p><b>GAMMA</b> [1] - 118:14</p> <p><b>gap</b> [1] - 60:24</p> <p><b>gatekeepers</b> [1] - 171:21</p> <p><b>gatekeeping</b> [1] - 201:3</p> <p><b>general</b> [15] - 27:23, 33:19, 67:16, 116:4, 116:6, 117:7,</p>				
<b>H</b>				
				<p><b>Hail</b> [1] - 171:1</p> <p><b>half</b> [8] - 11:5, 17:8,</p>



<p>54:21  <b>headwind</b> [1] - 132:20  <b>Health</b> [2] - 67:9, 88:19  <b>Healthcare</b> [1] - 156:19  <b>healthcare</b> [2] - 66:18, 93:9  <b>hear</b> [7] - 8:18, 40:11, 41:23, 46:15, 148:16, 162:12, 185:18  <b>heard</b> [15] - 41:24, 65:8, 71:25, 75:16, 107:2, 107:3, 113:20, 117:1, 144:12, 150:17, 172:8, 174:23, 177:24, 207:8  <b>hearing</b> [3] - 6:20, 34:25, 177:19  <b>hearsay</b> [19] - 22:16, 23:3, 23:5, 23:8, 23:9, 23:21, 27:8, 27:10, 27:12, 28:13, 28:16, 72:3, 72:6, 118:4, 120:4, 179:24, 180:19  <b>heavily</b> [4] - 31:18, 71:2, 95:10, 129:3  <b>heavy</b> [5] - 40:19, 129:5, 129:8, 180:6, 183:22  <b>heft</b> [1] - 24:9  <b>heightened</b> [2] - 110:11, 187:3  <b>held</b> [24] - 5:1, 12:6, 12:20, 23:3, 32:14, 32:20, 33:1, 35:24, 39:5, 51:8, 102:14, 120:6, 130:4, 131:19, 140:13, 175:23, 178:13, 186:4, 190:12, 191:11, 193:17, 193:23, 198:7, 199:2  <b>help</b> [2] - 34:24, 210:23  <b>helped</b> [1] - 68:24  <b>helpful</b> [3] - 46:17, 68:12, 202:20  <b>Hendrickson</b> [2] - 138:11, 155:22  <b>Hendrickson's</b> [1] - 196:15  <b>herd</b> [1] - 180:13  <b>herring</b> [1] - 120:5  <b>herself</b> [1] - 131:19  <b>hid</b> [4] - 96:15, 104:5, 106:22, 114:14</p>	<p><b>hidden</b> [1] - 203:3  <b>hide</b> [3] - 111:20, 113:24, 146:16  <b>hiding</b> [1] - 162:14  <b>high</b> [7] - 125:15, 125:25, 133:22, 161:25, 163:14, 184:8, 200:9  <b>higher</b> [3] - 19:25, 82:15, 142:21  <b>highest</b> [2] - 117:9, 164:20  <b>Highfields</b> [1] - 24:4  <b>Highland</b> [2] - 192:9, 192:12  <b>highlight</b> [2] - 68:5, 142:18  <b>highlighted</b> [3] - 88:1, 113:10, 170:16  <b>highlights</b> [1] - 97:12  <b>highly</b> [5] - 151:16, 198:13, 198:17, 208:8, 210:5  <b>hike</b> [10] - 123:19, 125:10, 125:16, 125:17, 125:24, 134:2, 134:5, 136:4, 161:24, 173:21  <b>hiked</b> [2] - 127:12, 135:19  <b>hikes</b> [23] - 19:18, 112:16, 122:16, 122:18, 122:24, 122:25, 123:5, 123:14, 124:7, 124:13, 124:18, 126:6, 126:20, 127:5, 127:15, 127:16, 129:5, 134:19, 134:21, 134:22, 135:2, 135:5, 135:6  <b>HIMMEL</b> [2] - 1:18, 5:20  <b>Himmel</b> [1] - 5:21  <b>himself</b> [4] - 24:17, 75:11, 104:19, 131:3  <b>hind</b> [1] - 181:18  <b>hindsight</b> [3] - 60:14, 88:14, 88:24  <b>hinge</b> [1] - 111:22  <b>hired</b> [2] - 97:19, 106:23  <b>history</b> [2] - 179:10, 180:1  <b>hit</b> [1] - 96:17  <b>hitched</b> [1] - 155:15  <b>hitches</b> [1] - 101:19  <b>hold</b> [1] - 146:24  <b>holding</b> [3] - 124:4,</p>	<p>131:3, 186:21  <b>Holdings</b> [1] - 192:17  <b>holdings</b> [3] - 19:20, 69:11, 71:4  <b>holds</b> [4] - 14:8, 32:17, 123:18, 147:10  <b>holistic</b> [1] - 186:23  <b>home</b> [1] - 52:10  <b>honest</b> [3] - 95:21, 186:14, 192:20  <b>honestly</b> [1] - 132:16  <b>Honor</b> [198] - 5:11, 5:13, 5:16, 5:18, 5:20, 5:24, 6:4, 6:7, 6:9, 7:9, 7:16, 7:19, 8:11, 8:14, 8:20, 9:5, 9:8, 9:16, 9:25, 10:3, 10:18, 10:24, 11:2, 11:8, 11:13, 11:15, 12:1, 12:2, 12:5, 12:12, 12:16, 12:20, 13:19, 14:8, 16:15, 17:19, 18:2, 18:11, 18:24, 19:12, 19:20, 19:24, 20:3, 20:10, 20:20, 21:25, 22:23, 23:6, 23:20, 24:5, 24:13, 25:4, 25:9, 25:10, 26:1, 26:9, 26:14, 26:15, 27:11, 29:7, 29:11, 29:21, 31:25, 34:3, 34:12, 34:21, 35:7, 35:14, 36:20, 37:2, 37:18, 38:1, 38:21, 40:9, 40:13, 41:1, 41:21, 45:14, 46:17, 47:24, 50:4, 50:19, 51:7, 55:18, 57:3, 64:11, 64:18, 64:21, 65:5, 67:7, 67:25, 69:25, 73:5, 73:6, 73:23, 76:12, 78:8, 79:12, 79:24, 79:25, 80:25, 81:6, 81:13, 81:16, 81:20, 81:22, 82:19, 83:2, 84:17, 85:22, 87:7, 87:8, 88:7, 89:6, 90:4, 90:6, 91:14, 91:21, 93:5, 93:16, 93:17, 93:20, 94:5, 94:14, 94:15, 94:19, 95:4, 95:14, 99:10, 103:11, 107:21, 110:9, 110:18, 112:19, 114:2, 116:13, 116:19, 117:21, 120:15, 120:17,</p>	<p>122:10, 126:9, 138:13, 139:1, 139:6, 149:17, 151:16, 161:7, 161:16, 161:22, 163:16, 164:24, 166:14, 166:16, 166:24, 169:19, 169:21, 170:7, 171:6, 171:8, 171:14, 171:17, 172:2, 173:8, 173:10, 175:2, 175:9, 175:13, 175:14, 176:19, 177:2, 177:5, 178:11, 178:17, 179:17, 180:11, 180:23, 182:12, 182:17, 182:20, 182:23, 183:2, 183:3, 186:25, 188:20, 188:22, 190:18, 191:3, 191:5, 199:25, 200:2, 202:17, 210:14, 210:19, 211:15  <b>Honor's</b> [1] - 190:14  <b>Honorable</b> [3] - 5:1, 5:2, 5:5  <b>HONORABLE</b> [1] - 1:14  <b>honored</b> [1] - 63:4  <b>hope</b> [3] - 26:9, 65:25, 67:7  <b>hoped</b> [2] - 9:17, 29:8  <b>hopefully</b> [1] - 65:5  <b>hoping</b> [2] - 65:7, 79:23  <b>horrible</b> [1] - 108:1  <b>hostile</b> [5] - 68:16, 71:6, 104:12, 107:6, 201:19  <b>hour</b> [2] - 183:4, 183:5  <b>hours</b> [7] - 76:20, 76:21, 76:23, 95:4, 167:6, 169:8, 169:9  <b>house</b> [1] - 5:7  <b>housekeeping</b> [1] - 6:13  <b>HR</b> [5] - 83:24, 84:1, 87:5, 96:2, 100:8  <b>huge</b> [3] - 124:11, 134:21, 138:2  <b>human</b> [1] - 19:5  <b>hump</b> [1] - 36:13  <b>hundred</b> [3] - 92:10, 94:21, 134:21  <b>hundreds</b> [3] - 34:7,</p>	<p>115:25, 120:18  <b>hurting</b> [1] - 101:6  <b>hydrocortisone</b> [1] - 127:6  <b>hypothetical</b> [6] - 72:2, 145:3, 145:6, 145:18, 145:19</p>
<b>I</b>				
<p><b>idea</b> [12] - 70:16, 105:22, 117:11, 146:10, 146:21, 147:12, 148:25, 155:15, 163:16, 174:22, 204:16, 207:4  <b>ideas</b> [1] - 94:2  <b>identical</b> [1] - 194:19  <b>identified</b> [12] - 14:1, 28:24, 60:25, 61:2, 84:23, 103:9, 115:17, 119:18, 120:19, 126:15, 177:15, 202:5  <b>identifies</b> [3] - 24:16, 87:24, 127:15  <b>identify</b> [5] - 6:14, 14:19, 40:5, 196:6, 200:14  <b>IETSEAP</b> [1] - 61:15  <b>ignored</b> [1] - 96:11  <b>ill</b> [2] - 22:17, 27:12  <b>ill-conceived</b> [1] - 27:12  <b>ill-fated</b> [1] - 22:17  <b>illegal</b> [14] - 14:20, 20:19, 30:14, 112:2, 112:6, 112:8, 113:1, 114:20, 114:23, 115:6, 177:6, 177:8, 199:11, 199:12  <b>illegally</b> [1] - 23:13  <b>illogical</b> [2] - 45:11, 49:24  <b>illustrated</b> [1] - 36:16  <b>illustrative</b> [1] - 151:18  <b>image</b> [4] - 148:18, 148:23, 149:1, 154:18  <b>imagine</b> [1] - 127:8  <b>immediate</b> [4] - 59:3, 99:2, 143:25, 206:3  <b>immediately</b> [4] - 107:8, 142:9, 142:17, 159:11  <b>impact</b> [8] - 21:6, 38:14, 44:9, 44:11, 54:18, 54:21, 204:21</p>				

<p><b>impairment</b> [6] - 107:18, 152:2, 152:4, 152:14, 156:21, 165:5</p> <p><b>impeaches</b> [1] - 117:11</p> <p><b>impeachment</b> [1] - 116:25</p> <p><b>impeded</b> [1] - 146:11</p> <p><b>impediment</b> [1] - 37:16</p> <p><b>impediments</b> [5] - 37:9, 41:19, 83:6, 88:22, 144:10</p> <p><b>impermissible</b> [1] - 10:16</p> <p><b>impermissibly</b> [1] - 17:16</p> <p><b>implement</b> [1] - 135:7</p> <p><b>implementation</b> [1] - 32:25</p> <p><b>implemented</b> [3] - 110:11, 122:15, 124:12</p> <p><b>implementing</b> [1] - 33:4</p> <p><b>implicated</b> [1] - 153:22</p> <p><b>implication</b> [1] - 20:17</p> <p><b>implications</b> [2] - 20:16, 42:9</p> <p><b>implicitly</b> [2] - 10:19, 42:18</p> <p><b>imply</b> [1] - 53:15</p> <p><b>implying</b> [1] - 14:25</p> <p><b>importance</b> [5] - 20:18, 201:20, 201:21, 203:10, 203:16</p> <p><b>important</b> [17] - 8:1, 22:3, 26:9, 29:23, 42:2, 45:8, 56:7, 58:12, 88:9, 93:16, 141:9, 144:20, 148:4, 157:20, 184:9, 191:25, 202:4</p> <p><b>importantly</b> [5] - 52:21, 129:13, 138:8, 148:15, 210:24</p> <p><b>impossible</b> [2] - 101:4, 187:19</p> <p><b>improper</b> [4] - 115:25, 145:13, 149:6, 194:24</p> <p><b>improperly</b> [3] - 142:15, 192:4, 194:5</p> <p><b>improve</b> [1] - 135:9</p> <p><b>improvement</b> [1] - 66:19</p>	<p><b>impunity</b> [1] - 140:24</p> <p><b>inactionable</b> [1] - 39:19</p> <p><b>inadmissible</b> [11] - 16:9, 22:13, 22:16, 23:2, 27:7, 27:10, 28:17, 173:15, 180:2, 191:14, 199:16</p> <p><b>inappropriate</b> [1] - 193:9</p> <p><b>inch</b> [1] - 181:5</p> <p><b>include</b> [3] - 176:14, 209:1, 209:25</p> <p><b>included</b> [2] - 108:25, 134:12</p> <p><b>including</b> [17] - 20:14, 23:1, 29:2, 31:7, 42:9, 49:6, 113:2, 115:6, 119:14, 127:5, 135:21, 135:22, 143:10, 208:8, 208:24, 209:3, 210:10</p> <p><b>income</b> [1] - 104:9</p> <p><b>inconsistent</b> [5] - 44:8, 45:13, 121:9, 176:21, 201:2</p> <p><b>incorporate</b> [1] - 199:3</p> <p><b>incorrect</b> [1] - 11:23</p> <p><b>increase</b> [13] - 17:22, 19:15, 32:23, 54:12, 54:18, 74:13, 79:1, 79:3, 123:9, 132:3, 132:6, 132:12, 198:15</p> <p><b>increased</b> [7] - 61:24, 69:12, 69:17, 71:4, 160:1</p> <p><b>increases</b> [22] - 11:20, 14:6, 14:11, 17:18, 19:12, 19:17, 19:21, 19:25, 20:11, 30:12, 30:15, 30:17, 30:19, 31:2, 31:24, 116:1, 124:3, 132:1, 134:11, 172:12, 172:14, 198:2</p> <p><b>incredibly</b> [2] - 106:21, 175:10</p> <p><b>incurring</b> [1] - 124:12</p> <p><b>indeed</b> [8] - 21:25, 25:19, 31:20, 31:25, 32:17, 36:12, 45:16, 178:18</p> <p><b>independence</b> [1] - 14:11</p> <p><b>independent</b> [5] - 8:21, 30:22, 32:2,</p>	<p>32:6, 104:15</p> <p><b>independently</b> [1] - 14:4</p> <p><b>indicate</b> [3] - 52:25, 127:13, 166:8</p> <p><b>indicated</b> [7] - 24:22, 57:1, 126:9, 127:3, 130:11, 133:11, 154:8</p> <p><b>indicates</b> [3] - 101:15, 164:11, 188:25</p> <p><b>indicating</b> [5] - 118:25, 120:25, 154:5, 185:12, 202:23</p> <p><b>indication</b> [2] - 32:16, 152:7</p> <p><b>indications</b> [1] - 103:1</p> <p><b>indicative</b> [2] - 20:13, 48:21</p> <p><b>indicators</b> [1] - 156:20</p> <p><b>indicia</b> [3] - 11:22, 119:15, 208:17</p> <p><b>indict</b> [1] - 29:17</p> <p><b>indirect</b> [1] - 110:24</p> <p><b>individual</b> [8] - 7:10, 8:8, 8:19, 9:3, 50:17, 80:15, 127:21, 143:11</p> <p><b>Individually</b> [1] - 1:4</p> <p><b>individuals</b> [2] - 67:2, 169:2</p> <p><b>indulgence</b> [2] - 8:3, 210:22</p> <p><b>Industries</b> [1] - 194:13</p> <p><b>Industry</b> [1] - 39:16</p> <p><b>industry</b> [24] - 12:9, 17:12, 17:18, 18:12, 18:17, 22:21, 53:7, 53:8, 53:14, 56:2, 66:17, 66:18, 75:23, 93:9, 123:3, 126:20, 135:15, 136:8, 149:25, 173:19, 203:13, 203:18</p> <p><b>inextricably</b> [1] - 156:3</p> <p><b>infancy</b> [1] - 37:17</p> <p><b>infer</b> [5] - 113:21, 117:4, 127:9, 127:17, 184:20</p> <p><b>inference</b> [42] - 11:13, 11:25, 16:17, 16:24, 19:2, 19:3, 19:6, 38:11, 71:2, 72:14, 95:12, 102:18, 107:21, 110:4, 110:5, 110:12, 110:15, 114:1, 114:3, 114:4,</p>	<p>128:16, 128:22, 129:19, 130:8, 133:7, 136:5, 136:13, 138:20, 138:21, 163:21, 164:2, 165:21, 170:25, 173:17, 173:18, 173:20, 173:23, 184:24, 184:25, 186:23</p> <p><b>inferences</b> [23] - 11:11, 95:6, 96:20, 97:2, 97:3, 97:7, 99:24, 100:1, 101:9, 108:12, 109:24, 114:5, 128:18, 128:19, 129:23, 183:10, 184:13, 188:13, 188:16, 192:13, 192:15, 199:16, 199:21</p> <p><b>infinitesimal</b> [1] - 29:3</p> <p><b>infirm</b> [1] - 10:6</p> <p><b>inflated</b> [3] - 97:20, 99:9, 178:7</p> <p><b>inflation</b> [2] - 148:11, 178:8</p> <p><b>influence</b> [1] - 184:12</p> <p><b>informal</b> [1] - 208:10</p> <p><b>information</b> [91] - 21:9, 21:24, 22:2, 22:8, 24:14, 27:16, 38:12, 40:19, 46:3, 46:6, 52:22, 63:17, 70:2, 70:7, 70:9, 71:15, 83:16, 83:17, 86:10, 88:11, 88:12, 90:3, 90:13, 92:9, 92:22, 96:15, 96:17, 100:13, 114:13, 114:14, 117:21, 140:15, 144:15, 146:12, 148:6, 150:5, 150:21, 153:4, 153:7, 153:9, 153:14, 154:4, 154:7, 154:18, 154:21, 155:20, 156:6, 156:10, 156:22, 157:13, 157:17, 157:21, 158:2, 158:13, 158:18, 158:25, 159:12, 159:17, 160:13, 160:16, 160:19, 160:21, 169:7, 179:14, 189:4, 189:9, 191:24, 193:4, 193:24, 194:17,</p>	<p>195:13, 196:12, 196:16, 196:17, 196:25, 197:1, 197:4, 197:5, 201:20, 201:21, 202:3, 202:25, 203:10, 203:17, 205:1, 206:12, 206:18, 206:23, 208:11</p> <p><b>informed</b> [4] - 108:17, 134:8, 173:10, 178:25</p> <p><b>infrastructure</b> [1] - 91:3</p> <p><b>ing</b> [1] - 150:19</p> <p><b>ingested</b> [1] - 158:8</p> <p><b>inherent</b> [1] - 160:4</p> <p><b>initial</b> [9] - 7:1, 30:8, 38:18, 85:5, 86:1, 87:13, 87:24, 107:23, 207:25</p> <p><b>initiate</b> [1] - 70:3</p> <p><b>initiated</b> [4] - 70:4, 70:6, 70:8, 70:15</p> <p><b>injectable</b> [1] - 209:13</p> <p><b>injectables</b> [1] - 126:16</p> <p><b>injected</b> [1] - 116:6</p> <p><b>injunctive</b> [6] - 178:15, 178:21, 179:9, 189:15, 190:2, 190:11</p> <p><b>injured</b> [1] - 178:24</p> <p><b>injury</b> [1] - 141:11</p> <p><b>injustice</b> [1] - 182:8</p> <p><b>innocence</b> [2] - 66:5, 72:25</p> <p><b>innocuous</b> [2] - 125:3, 126:21</p> <p><b>input</b> [3] - 134:2, 173:2, 173:3</p> <p><b>inquire</b> [1] - 135:1</p> <p><b>inquiries</b> [2] - 18:16, 130:13</p> <p><b>insight</b> [1] - 71:19</p> <p><b>insinuated</b> [1] - 142:15</p> <p><b>insist</b> [2] - 69:5, 69:6</p> <p><b>insisting</b> [1] - 167:3</p> <p><b>instance</b> [1] - 171:23</p> <p><b>instead</b> [5] - 96:1, 101:18, 128:1, 183:24, 199:11</p> <p><b>instill</b> [1] - 183:17</p> <p><b>instruct</b> [3] - 202:17, 202:18, 203:24</p> <p><b>instructing</b> [1] - 194:1</p> <p><b>insubstantial</b> [1] - 20:1</p>
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------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

<p><b>insulated</b> [5] - 56:1, 131:9, 131:16, 133:2, 163:13</p> <p><b>insulation</b> [1] - 131:19</p> <p><b>integrate</b> [2] - 58:22, 184:7</p> <p><b>integrated</b> [5] - 58:20, 63:14, 97:25, 104:4, 166:2</p> <p><b>integrating</b> [1] - 84:1</p> <p><b>integration</b> [145] - 10:9, 10:25, 35:12, 35:19, 37:10, 37:14, 37:17, 37:25, 38:3, 38:6, 38:12, 38:18, 38:23, 39:1, 39:6, 39:14, 39:19, 40:15, 40:25, 41:12, 41:14, 41:19, 41:23, 42:17, 46:21, 48:14, 50:3, 50:10, 50:11, 51:5, 57:11, 57:12, 57:17, 57:22, 58:2, 58:6, 58:10, 58:15, 58:21, 59:5, 59:22, 59:23, 59:24, 60:9, 60:19, 61:4, 61:8, 61:14, 61:17, 61:20, 62:4, 62:20, 63:13, 63:18, 64:1, 64:3, 64:4, 64:6, 64:9, 64:13, 64:14, 66:10, 67:15, 82:21, 82:23, 83:7, 83:19, 83:21, 84:12, 85:5, 85:6, 85:13, 86:1, 86:2, 86:11, 86:12, 86:15, 86:19, 87:4, 87:12, 87:13, 87:18, 87:20, 87:25, 88:24, 90:22, 91:8, 96:3, 98:18, 100:7, 100:15, 100:17, 100:20, 101:3, 101:5, 101:6, 101:12, 101:19, 101:21, 102:8, 102:14, 102:21, 103:9, 104:1, 105:15, 108:17, 108:19, 108:21, 108:23, 137:11, 137:12, 152:14, 153:21, 157:5, 165:1, 166:11, 166:13, 169:18, 170:1, 170:5, 170:14, 170:15, 170:19, 170:22, 170:23, 182:17, 182:18, 184:9,</p>	<p>184:20, 184:21, 186:13, 186:18, 187:11, 187:13, 187:14, 187:15, 187:18, 187:23, 188:4</p> <p><b>Integration</b> [1] - 39:7</p> <p><b>integration-relate</b> [1] - 39:6</p> <p><b>integrations</b> [3] - 83:11, 100:17, 100:22</p> <p><b>intend</b> [1] - 138:19</p> <p><b>intended</b> [2] - 9:1, 52:11</p> <p><b>intense</b> [2] - 9:10, 21:15</p> <p><b>intensity</b> [2] - 160:17, 161:5</p> <p><b>intent</b> [7] - 36:5, 38:20, 42:19, 68:7, 186:7, 192:6, 192:19</p> <p><b>intentionally</b> [3] - 66:21, 78:22, 130:2</p> <p><b>interact</b> [3] - 18:11, 41:12, 41:13</p> <p><b>interactions</b> [4] - 16:12, 17:11, 18:3, 18:7</p> <p><b>interdependence</b> [2] - 14:11, 15:6</p> <p><b>interdependent</b> [2] - 14:2, 33:5</p> <p><b>interest</b> [3] - 14:24, 32:16, 69:2</p> <p><b>interesting</b> [1] - 175:18</p> <p><b>interestingly</b> [2] - 144:11, 145:24</p> <p><b>interfering</b> [2] - 140:11, 188:5</p> <p><b>interm</b> [1] - 99:8</p> <p><b>internal</b> [7] - 103:11, 106:2, 106:9, 106:17, 121:12, 127:3, 187:8</p> <p><b>internally</b> [6] - 33:10, 44:8, 45:13, 104:6, 114:9, 122:2</p> <p><b>International</b> [1] - 193:7</p> <p><b>interpolate</b> [1] - 206:22</p> <p><b>interpretation</b> [5] - 149:5, 153:21, 154:7, 171:18, 171:24</p> <p><b>interpretations</b> [2] - 167:2, 167:4</p> <p><b>interpreted</b> [2] -</p>	<p>155:17, 169:19</p> <p><b>intertwined</b> [1] - 156:3</p> <p><b>intervening</b> [1] - 9:10</p> <p><b>Intervert</b> [1] - 11:15</p> <p><b>intimated</b> [1] - 10:4</p> <p><b>intraday</b> [1] - 159:10</p> <p><b>introduce</b> [1] - 117:6</p> <p><b>introduced</b> [1] - 120:16</p> <p><b>investigated</b> [2] - 131:5, 131:17</p> <p><b>investigation</b> [18] - 23:14, 30:2, 30:3, 30:5, 52:23, 118:6, 118:10, 118:18, 118:21, 119:4, 119:8, 119:11, 120:13, 131:7, 158:25, 159:6, 159:19, 160:23</p> <p><b>investigations</b> [2] - 27:9, 117:19</p> <p><b>investigators</b> [1] - 159:22</p> <p><b>Investment</b> [1] - 203:14</p> <p><b>investment</b> [5] - 37:5, 144:7, 191:23, 201:17, 203:16</p> <p><b>investor</b> [5] - 83:25, 84:3, 84:11, 84:14, 202:2</p> <p><b>investors</b> [58] - 9:2, 13:11, 37:24, 90:24, 96:16, 99:11, 99:17, 101:17, 102:23, 103:21, 103:25, 104:6, 105:1, 105:13, 107:9, 107:10, 108:8, 108:18, 111:11, 112:5, 113:14, 113:24, 114:11, 114:14, 129:13, 130:3, 130:4, 130:15, 130:20, 131:3, 131:6, 133:9, 136:14, 138:3, 138:7, 138:17, 139:19, 140:9, 151:3, 151:25, 154:8, 155:7, 156:1, 156:15, 157:22, 160:21, 183:18, 183:19, 183:23, 186:14, 190:4, 190:12, 191:24, 195:10, 201:22, 203:10, 205:17</p> <p><b>involve</b> [3] - 72:11,</p>	<p>122:24, 135:25</p> <p><b>involved</b> [21] - 9:14, 17:13, 19:13, 25:6, 54:23, 64:13, 64:14, 75:2, 75:15, 77:6, 86:11, 88:12, 107:1, 123:20, 124:2, 133:22, 163:14, 167:19, 167:22, 172:24, 173:1</p> <p><b>Involved</b> [1] - 72:7</p> <p><b>involvement</b> [1] - 99:3</p> <p><b>involves</b> [5] - 72:5, 72:6, 112:1, 120:9, 137:11</p> <p><b>involving</b> [4] - 12:21, 15:2, 137:12, 198:8</p> <p><b>iota</b> [1] - 54:2</p> <p><b>IRFS</b> [8] - 59:10, 59:12, 60:24, 62:5, 63:9, 165:10, 165:11, 165:18</p> <p><b>Irish</b> [1] - 104:24</p> <p><b>irrational</b> [2] - 44:7, 125:9</p> <p><b>irrelevant</b> [2] - 26:8, 60:6</p> <p><b>irreparably</b> [1] - 178:24</p> <p><b>irritate</b> [1] - 31:13</p> <p><b>isolating</b> [1] - 152:16</p> <p><b>Israel</b> [2] - 176:20, 176:22</p> <p><b>issue</b> [47] - 14:9, 27:23, 28:19, 30:18, 33:18, 34:16, 36:9, 40:15, 42:1, 43:11, 48:4, 57:18, 60:2, 60:18, 60:25, 61:2, 62:5, 64:4, 65:20, 77:8, 79:8, 79:17, 81:19, 82:5, 82:21, 95:22, 97:10, 101:21, 109:23, 129:20, 134:15, 150:25, 153:16, 165:18, 166:1, 166:21, 169:25, 173:24, 185:4, 186:1, 188:12, 197:13, 198:10, 203:17</p> <p><b>issued</b> [1] - 110:16</p> <p><b>issues</b> [31] - 8:7, 15:24, 26:8, 34:14, 41:19, 47:23, 58:12, 60:23, 65:11, 66:6, 76:24, 94:16, 94:18, 94:20, 97:5, 122:8, 149:12, 152:14,</p>	<p>155:25, 157:11, 165:6, 170:6, 174:1, 177:17, 182:17, 188:19, 193:14, 201:23, 202:9, 202:15, 204:19</p> <p><b>issuing</b> [1] - 175:21</p> <p><b>IT</b> [10] - 83:24, 83:25, 86:9, 87:5, 88:12, 88:14, 88:15, 92:15, 96:2, 100:8</p> <p><b>items</b> [3] - 98:20, 99:1, 136:10</p> <p><b>itself</b> [7] - 44:14, 98:6, 101:6, 116:6, 116:12, 120:11, 178:21</p> <p><b>ITT</b> [5] - 193:16, 193:23, 194:3, 194:18, 194:20</p> <p><b>Ivy</b> [1] - 204:5</p>
<b>J</b>				
<p><b>J.W</b> [1] - 121:14</p> <p><b>JACOBSON</b> [1] - 2:14</p> <p><b>jail</b> [1] - 164:1</p> <p><b>JAMES</b> [3] - 2:7, 2:15, 2:16</p> <p><b>James</b> [3] - 5:13, 5:25, 139:6</p> <p><b>Jamie</b> [2] - 5:24, 7:21</p> <p><b>January</b> [3] - 36:3, 80:21, 85:11</p> <p><b>JENSEN</b> [2] - 2:8, 5:18</p> <p><b>Jensen</b> [1] - 5:18</p> <p><b>JERSEY</b> [1] - 1:1</p> <p><b>Jersey</b> [3] - 1:11, 1:19, 2:12</p> <p><b>Jesse</b> [1] - 5:18</p> <p><b>JESSE</b> [1] - 2:8</p> <p><b>job</b> [10] - 18:16, 48:19, 51:14, 78:5, 78:9, 78:20, 154:6, 164:2, 164:4, 172:16</p> <p><b>jobs</b> [1] - 163:20</p> <p><b>Joe</b> [12] - 86:13, 88:17, 88:18, 93:2, 97:11, 99:3, 105:9, 105:18, 108:20, 132:10, 163:19</p> <p><b>Joe's</b> [1] - 88:21</p> <p><b>JOHN</b> [1] - 3:3</p> <p><b>John</b> [8] - 6:9, 25:20, 50:24, 53:24, 121:14, 134:4, 138:10, 161:21</p> <p><b>joining</b> [2] - 168:23, 179:4</p> <p><b>joint</b> [1] - 18:19</p>				

<p><b>Jordan</b> <sup>[1]</sup> - 193:7</p> <p><b>JOSEPH</b> <sup>[1]</sup> - 1:8</p> <p><b>Joseph</b> <sup>[10]</sup> - 2:22, 6:8, 6:24, 65:4, 86:9, 86:12, 168:4, 168:5, 168:7, 169:17</p> <p><b>Josh</b> <sup>[2]</sup> - 5:11, 94:15</p> <p><b>JOSHUA</b> <sup>[1]</sup> - 2:3</p> <p><b>Journal</b> <sup>[2]</sup> - 159:16, 159:20</p> <p><b>JP</b> <sup>[1]</sup> - 97:23</p> <p><b>judge</b> <sup>[2]</sup> - 171:16, 211:6</p> <p><b>JUDGE</b> <sup>[1]</sup> - 1:14</p> <p><b>Judge</b> <sup>[29]</sup> - 5:2, 5:3, 7:25, 9:5, 9:11, 14:17, 29:11, 29:23, 30:8, 35:17, 38:25, 39:10, 40:13, 40:17, 42:2, 50:7, 94:24, 104:13, 130:7, 133:5, 137:6, 140:13, 157:7, 162:13, 177:10, 184:2, 185:3, 186:19</p> <p><b>Judge's</b> <sup>[1]</sup> - 182:16</p> <p><b>judges</b> <sup>[1]</sup> - 171:20</p> <p><b>judgment</b> <sup>[53]</sup> - 6:23, 6:24, 6:25, 7:8, 7:10, 8:11, 16:3, 19:4, 19:11, 27:2, 27:25, 28:14, 32:3, 33:23, 34:14, 50:16, 53:19, 55:23, 65:24, 68:2, 81:3, 93:15, 96:22, 97:4, 108:13, 115:10, 115:13, 116:7, 116:11, 116:14, 117:22, 128:17, 128:18, 140:20, 149:5, 149:8, 150:8, 150:22, 153:19, 161:3, 162:4, 171:2, 175:8, 177:4, 179:12, 179:18, 181:1, 184:18, 185:24, 187:1, 188:9, 200:8, 200:23</p> <p><b>JUDGMENT/LOSS</b> <sup>[1]</sup> - 4:3</p> <p><b>judicial</b> <sup>[1]</sup> - 76:3</p> <p><b>Judy</b> <sup>[15]</sup> - 3:5, 6:10, 6:25, 52:7, 52:8, 61:12, 97:11, 132:10, 134:6, 138:1, 161:21, 162:9, 162:16, 163:19</p> <p><b>juiced</b> <sup>[1]</sup> - 187:6</p>	<p><b>JULIEN</b> <sup>[2]</sup> - 1:14, 5:1</p> <p><b>Julien</b> <sup>[1]</sup> - 5:5</p> <p><b>July</b> <sup>[15]</sup> - 8:20, 14:18, 29:24, 35:16, 92:13, 102:10, 103:5, 103:13, 113:15, 121:15, 132:21, 169:16, 170:1, 176:2, 187:17</p> <p><b>jump</b> <sup>[1]</sup> - 48:20</p> <p><b>juncture</b> <sup>[1]</sup> - 116:11</p> <p><b>June</b> <sup>[23]</sup> - 29:14, 36:21, 60:4, 60:5, 60:6, 60:11, 60:17, 61:11, 61:12, 61:21, 62:2, 62:10, 63:18, 63:21, 80:10, 80:14, 99:22, 100:3, 100:24, 108:25, 165:4, 165:7, 165:14</p> <p><b>juries</b> <sup>[2]</sup> - 96:21, 171:23</p> <p><b>juris</b> <sup>[1]</sup> - 149:1</p> <p><b>jurisdictions</b> <sup>[1]</sup> - 117:10</p> <p><b>jurisprudence</b> <sup>[1]</sup> - 39:20</p> <p><b>jurors</b> <sup>[4]</sup> - 123:10, 130:16, 182:2, 201:25</p> <p><b>jury</b> <sup>[97]</sup> - 65:21, 74:16, 81:18, 82:18, 93:7, 95:6, 95:19, 95:22, 97:14, 99:23, 100:9, 102:5, 102:17, 104:2, 107:20, 108:5, 109:11, 109:13, 109:23, 110:3, 111:7, 111:11, 114:1, 114:7, 114:21, 114:22, 117:3, 121:23, 122:17, 123:8, 123:16, 124:11, 125:1, 125:5, 125:7, 126:4, 126:5, 126:19, 126:23, 127:8, 127:17, 127:23, 128:14, 128:23, 129:4, 129:17, 129:20, 129:25, 131:22, 133:7, 133:18, 134:9, 134:18, 134:25, 135:13, 135:14, 136:5, 136:6, 136:11, 136:12, 138:20, 153:18, 162:1,</p>	<p>162:5, 164:6, 171:10, 171:20, 173:9, 180:21, 181:17, 181:19, 181:23, 182:7, 182:20, 183:12, 184:19, 184:24, 185:18, 185:24, 186:4, 186:10, 186:16, 186:25, 188:16, 188:17, 193:19, 194:2, 201:4, 202:17, 202:18, 202:20, 203:24</p> <p><b>justice</b> <sup>[2]</sup> - 211:5</p> <p><b>Justice</b> <sup>[7]</sup> - 9:18, 52:13, 52:20, 117:2, 159:17, 160:24, 202:8</p>	<p>162:19</p> <p><b>knowingly</b> <sup>[1]</sup> - 110:16</p> <p><b>knowledge</b> <sup>[20]</sup> - 28:2, 28:12, 41:15, 42:19, 52:2, 68:7, 75:1, 77:22, 89:22, 98:8, 111:10, 130:11, 131:7, 131:19, 168:25, 192:5, 192:7, 192:14, 203:3, 204:14</p> <p><b>knowledgeable</b> <sup>[2]</sup> - 130:5, 131:4</p> <p><b>known</b> <sup>[16]</sup> - 45:12, 45:18, 49:9, 88:20, 132:15, 133:9, 133:10, 143:4, 147:14, 148:7, 166:22, 190:4, 190:5, 195:14, 196:8, 202:24</p> <p><b>knows</b> <sup>[5]</sup> - 29:12, 45:4, 67:25, 69:25, 74:20</p>	<p>210:19, 210:20</p> <p><b>lastly</b> <sup>[1]</sup> - 158:21</p> <p><b>late</b> <sup>[4]</sup> - 98:10, 131:25, 183:4, 191:2</p> <p><b>latitude</b> <sup>[1]</sup> - 201:9</p> <p><b>launched</b> <sup>[3]</sup> - 141:13, 145:5, 154:21</p> <p><b>launches</b> <sup>[3]</sup> - 157:19, 158:11, 158:16</p> <p><b>law</b> <sup>[34]</sup> - 10:16, 11:24, 20:18, 26:7, 27:8, 28:5, 29:15, 31:8, 34:21, 35:7, 38:24, 44:3, 65:10, 71:2, 72:17, 74:14, 109:23, 110:10, 117:9, 118:11, 120:13, 164:18, 164:19, 164:20, 164:22, 175:2, 175:3, 176:7, 182:4, 189:19, 193:25, 194:12, 199:17, 199:21</p> <p><b>lawful</b> <sup>[4]</sup> - 14:7, 14:17, 21:17, 199:5</p> <p><b>lawfully</b> <sup>[1]</sup> - 13:24</p> <p><b>laws</b> <sup>[3]</sup> - 123:23, 140:23, 148:24</p> <p><b>lawsuit</b> <sup>[1]</sup> - 137:11</p> <p><b>lawsuits</b> <sup>[5]</sup> - 143:9, 143:11, 143:16, 167:23, 178:16</p> <p><b>lawyer</b> <sup>[3]</sup> - 76:3, 172:21, 180:15</p> <p><b>lawyers</b> <sup>[2]</sup> - 171:22</p> <p><b>layman</b> <sup>[1]</sup> - 204:14</p> <p><b>Lead</b> <sup>[3]</sup> - 1:19, 2:5, 2:9</p> <p><b>lead</b> <sup>[1]</sup> - 155:13</p> <p><b>leader</b> <sup>[1]</sup> - 20:25</p> <p><b>leadership</b> <sup>[1]</sup> - 156:1</p> <p><b>leading</b> <sup>[2]</sup> - 71:12, 178:13</p> <p><b>leads</b> <sup>[1]</sup> - 14:2</p> <p><b>League</b> <sup>[1]</sup> - 204:5</p> <p><b>League-educated</b> <sup>[1]</sup> - 204:5</p> <p><b>leap</b> <sup>[2]</sup> - 55:17, 55:18</p> <p><b>learn</b> <sup>[2]</sup> - 38:13, 40:20</p> <p><b>learned</b> <sup>[3]</sup> - 85:12, 175:1, 196:19</p> <p><b>leas</b> <sup>[1]</sup> - 45:17</p> <p><b>least</b> <sup>[13]</sup> - 34:4, 62:7, 112:12, 116:23, 116:24, 124:21, 129:24, 130:1, 133:20, 136:14, 155:21, 198:16,</p>
<b>K</b>				
<p><b>Kate</b> <sup>[1]</sup> - 6:1</p> <p><b>KATHERINE</b> <sup>[1]</sup> - 2:15</p> <p><b>keep</b> <sup>[5]</sup> - 55:19, 80:2, 80:7, 83:11, 163:25</p> <p><b>keeping</b> <sup>[1]</sup> - 80:19</p> <p><b>kept</b> <sup>[3]</sup> - 134:16, 163:6, 170:22</p> <p><b>key</b> <sup>[2]</sup> - 111:21, 134:14</p> <p><b>kids</b> <sup>[1]</sup> - 45:21</p> <p><b>kills</b> <sup>[1]</sup> - 47:4</p> <p><b>Kincaid</b> <sup>[16]</sup> - 40:12, 40:14, 40:19, 40:20, 41:6, 41:16, 41:18, 41:22, 42:3, 42:7, 91:23, 180:7, 180:12, 180:13, 185:6, 185:7</p> <p><b>KINCAID</b> <sup>[1]</sup> - 40:12</p> <p><b>Kincaid's</b> <sup>[1]</sup> - 42:13</p> <p><b>kind</b> <sup>[22]</sup> - 10:2, 21:3, 22:6, 39:12, 58:4, 64:7, 74:24, 75:1, 76:6, 80:19, 98:22, 126:17, 148:23, 162:12, 169:19, 173:21, 175:6, 179:2, 182:7, 183:8, 203:4, 209:9</p> <p><b>kindly</b> <sup>[1]</sup> - 145:2</p> <p><b>kinds</b> <sup>[2]</sup> - 144:15, 185:15</p> <p><b>King</b> <sup>[1]</sup> - 1:10</p> <p><b>Kirsten</b> <sup>[1]</sup> - 104:22</p> <p><b>Kmart</b> <sup>[1]</sup> - 191:17</p> <p><b>knowing</b> <sup>[5]</sup> - 46:19, 54:23, 57:12, 74:2,</p>				
<b>L</b>				
<p><b>lack</b> <sup>[13]</sup> - 23:24, 30:5, 30:7, 32:12, 37:14, 46:16, 57:1, 65:9, 66:2, 102:23, 118:7, 137:22, 179:25</p> <p><b>Lackdawalla</b> <sup>[1]</sup> - 209:20</p> <p><b>lacked</b> <sup>[2]</sup> - 37:10, 195:17</p> <p><b>lacking</b> <sup>[2]</sup> - 16:7, 27:1</p> <p><b>lacks</b> <sup>[2]</sup> - 24:3, 177:8</p> <p><b>laid</b> <sup>[1]</sup> - 31:5</p> <p><b>land</b> <sup>[2]</sup> - 175:20, 176:13</p> <p><b>landscape</b> <sup>[1]</sup> - 180:6</p> <p><b>language</b> <sup>[8]</sup> - 65:19, 82:20, 167:2, 171:9, 171:15, 171:17, 172:3, 172:16</p> <p><b>large</b> <sup>[8]</sup> - 10:10, 30:1, 132:1, 152:17, 168:11, 168:15, 168:16, 198:14</p> <p><b>largely</b> <sup>[4]</sup> - 15:5, 191:25, 200:23, 204:15</p> <p><b>larger</b> <sup>[1]</sup> - 62:1</p> <p><b>last</b> <sup>[12]</sup> - 76:18, 80:16, 85:23, 147:11, 163:16, 168:3, 172:18, 175:1, 183:5, 183:7,</p>				



<p>204:7</p> <p><b>leave</b> [6] - 7:4, 64:22, 81:19, 93:7, 154:5, 188:19</p> <p><b>leaving</b> [6] - 48:19, 154:9, 154:23, 155:5, 155:18, 157:15</p> <p><b>lectern</b> [3] - 6:21, 7:20</p> <p><b>led</b> [1] - 103:10</p> <p><b>LEDA</b> [1] - 5:3</p> <p><b>left</b> [11] - 11:3, 31:16, 67:11, 82:4, 84:19, 87:15, 88:10, 155:10, 155:17, 182:9, 184:11</p> <p><b>left-hand</b> [1] - 87:15</p> <p><b>legal</b> [17] - 13:21, 14:21, 112:8, 113:1, 161:1, 193:8, 194:25, 195:25, 199:11, 199:20, 202:15, 203:1, 203:5, 203:12, 204:16, 204:19, 205:6</p> <p><b>legally</b> [3] - 45:15, 118:6, 194:23</p> <p><b>legitimate</b> [4] - 18:9, 18:18, 122:6, 127:11</p> <p><b>legitimately</b> [1] - 174:25</p> <p><b>legs</b> [1] - 181:18</p> <p><b>length</b> [1] - 178:10</p> <p><b>less</b> [11] - 18:21, 44:25, 45:18, 47:6, 61:11, 77:24, 78:3, 78:15, 142:2, 152:7, 185:16</p> <p><b>lesser</b> [1] - 200:25</p> <p><b>letter</b> [5] - 74:6, 74:21, 74:25, 115:19, 132:12</p> <p><b>letters</b> [1] - 74:9</p> <p><b>letting</b> [1] - 70:14</p> <p><b>Letting</b> [1] - 32:23</p> <p><b>level</b> [8] - 20:25, 75:12, 75:13, 127:21, 128:5, 128:9, 133:22, 184:9</p> <p><b>levels</b> [1] - 81:12</p> <p><b>Lexus</b> [2] - 110:9, 186:3</p> <p><b>liabilities</b> [1] - 71:1</p> <p><b>liability</b> [8] - 33:23, 94:16, 140:19, 145:9, 145:10, 145:12, 147:2, 147:3</p> <p><b>liable</b> [2] - 51:8, 140:18</p>	<p><b>liaison</b> [1] - 5:21</p> <p><b>liberty</b> [2] - 114:4, 114:11</p> <p><b>Library</b> [1] - 203:14</p> <p><b>lie</b> [4] - 68:14, 104:2, 114:10, 192:15</p> <p><b>life</b> [3] - 13:19, 22:17, 24:25</p> <p><b>light</b> [4] - 38:4, 186:6, 196:5, 201:22</p> <p><b>likelihood</b> [2] - 107:18, 204:22</p> <p><b>likely</b> [2] - 33:12, 45:6</p> <p><b>likewise</b> [1] - 107:13</p> <p><b>limit</b> [1] - 203:22</p> <p><b>limitations</b> [1] - 29:21</p> <p><b>limited</b> [7] - 96:24, 120:9, 124:4, 126:10, 137:16, 137:17, 204:10</p> <p><b>line</b> [13] - 14:5, 36:23, 39:1, 40:12, 57:22, 59:25, 99:21, 101:20, 102:9, 102:19, 135:10, 186:15</p> <p><b>lines</b> [3] - 128:2, 154:19, 172:18</p> <p><b>link</b> [1] - 119:9</p> <p><b>linking</b> [2] - 101:5, 152:13</p> <p><b>list</b> [6] - 14:19, 45:24, 63:6, 87:17, 192:4, 192:25</p> <p><b>listening</b> [1] - 210:15</p> <p><b>lists</b> [1] - 187:23</p> <p><b>litany</b> [1] - 166:18</p> <p><b>literally</b> [2] - 66:12, 121:6</p> <p><b>litigant</b> [1] - 10:4</p> <p><b>Litigation</b> [2] - 35:21, 35:22</p> <p><b>litigation</b> [5] - 23:23, 52:13, 100:1, 114:3, 128:22</p> <p><b>Litowitz</b> [2] - 5:14, 5:19</p> <p><b>LITOWITZ</b> [1] - 2:7</p> <p><b>live</b> [2] - 115:9, 115:12</p> <p><b>lives</b> [1] - 66:19</p> <p><b>LLP</b> [8] - 1:17, 2:2, 2:7, 2:14, 2:20, 3:2, 5:12, 5:17</p> <p><b>loading</b> [2] - 106:9, 187:10</p> <p><b>loads</b> [1] - 186:9</p> <p><b>loaf</b> [4] - 123:12, 181:25, 182:1, 182:2</p> <p><b>loaned</b> [1] - 76:19</p> <p><b>logic</b> [3] - 8:6, 11:24,</p>	<p>35:7</p> <p><b>logical</b> [3] - 78:2, 163:21, 176:12</p> <p><b>logistics</b> [1] - 24:20</p> <p><b>London</b> [1] - 102:14</p> <p><b>long-term</b> [1] - 91:6</p> <p><b>look</b> [52] - 13:23, 18:13, 51:15, 54:24, 55:1, 56:4, 58:24, 60:9, 60:21, 63:6, 65:15, 72:23, 74:16, 75:10, 78:14, 82:7, 84:16, 85:9, 87:8, 87:17, 87:18, 92:2, 92:11, 118:19, 121:23, 142:22, 144:22, 152:19, 152:24, 154:22, 154:24, 158:15, 159:10, 163:8, 167:9, 169:21, 169:22, 170:3, 171:9, 171:17, 172:9, 172:17, 176:9, 176:24, 189:2, 189:17, 190:3, 206:17, 206:22, 208:21, 209:21</p> <p><b>looked</b> [7] - 143:8, 153:1, 155:11, 202:2, 205:18, 208:19, 209:12</p> <p><b>looking</b> [9] - 61:15, 62:6, 78:5, 78:9, 78:20, 79:2, 82:25, 123:14, 172:17</p> <p><b>looks</b> [18] - 40:13, 74:25, 107:19, 108:1, 114:12, 143:22, 152:20, 157:20, 157:21, 171:14, 204:25, 205:20, 205:21, 205:25, 206:18, 206:21, 208:24, 210:2</p> <p><b>loose</b> [2] - 39:8, 58:7</p> <p><b>lose</b> [1] - 124:19</p> <p><b>losing</b> [2] - 127:14, 178:25</p> <p><b>loss</b> [40] - 8:4, 31:16, 43:16, 44:7, 44:16, 47:19, 47:23, 48:1, 48:9, 49:1, 50:15, 94:17, 139:2, 139:25, 140:25, 141:2, 141:4, 141:5, 141:11, 147:2, 148:1, 148:2, 148:5,</p>	<p>149:2, 149:9, 149:12, 149:15, 150:6, 150:8, 150:11, 153:25, 158:4, 161:7, 177:21, 177:22, 188:19, 195:5, 204:3, 206:9</p> <p><b>losses</b> [2] - 127:16, 195:10</p> <p><b>lost</b> [2] - 43:21, 140:21</p> <p><b>love</b> [1] - 60:6</p> <p><b>low</b> [2] - 107:9, 138:8</p> <p><b>LOWENSTEIN</b> [1] - 1:17</p> <p><b>Lowenstein</b> [2] - 1:18, 5:21</p> <p><b>lower</b> [9] - 45:4, 82:15, 107:9, 127:1, 135:17, 138:6, 164:10, 174:3, 174:14</p> <p><b>LP</b> [1] - 192:9</p> <p><b>lunch</b> [1] - 94:4</p> <p><b>Luncheon</b> [1] - 94:10</p> <p><b>Luther</b> [1] - 1:10</p> <p><b>ly</b> [1] - 23:18</p> <p><b>lying</b> [4] - 46:20, 86:20, 87:11, 142:16</p>	<p><b>manipulated</b> [3] - 102:12, 106:8, 187:10</p> <p><b>manipulation</b> [2] - 98:23, 106:11</p> <p><b>manipulations</b> [4] - 104:7, 105:14, 106:3, 109:16</p> <p><b>manipulative</b> [1] - 195:8</p> <p><b>manufacture</b> [1] - 126:11</p> <p><b>manufacturers</b> [1] - 121:5</p> <p><b>manufacturing</b> [5] - 13:6, 91:3, 91:4, 91:13, 91:17</p> <p><b>Marc</b> [4] - 86:15, 86:16, 92:23, 92:24</p> <p><b>March</b> [21] - 10:10, 10:25, 11:1, 35:14, 38:3, 57:20, 58:8, 58:13, 58:14, 58:15, 59:1, 60:16, 69:24, 70:9, 85:3, 85:14, 85:20, 158:24, 159:3, 170:24, 186:4</p> <p><b>margin</b> [4] - 122:8, 125:15, 125:24, 135:8</p> <p><b>margins</b> [5] - 125:9, 125:11, 125:13, 125:17, 125:25</p> <p><b>Marino</b> [3] - 97:4, 97:6, 128:24</p> <p><b>market</b> [86] - 11:21, 13:1, 13:9, 13:11, 13:16, 14:16, 21:5, 21:6, 21:7, 21:24, 22:5, 31:11, 31:14, 31:21, 32:12, 32:13, 32:23, 33:6, 33:14, 33:19, 34:10, 42:12, 49:13, 55:1, 67:14, 77:10, 77:12, 77:16, 77:22, 78:3, 78:15, 78:22, 79:14, 79:16, 79:18, 121:15, 126:2, 127:14, 136:2, 147:25, 148:8, 149:23, 149:25, 151:2, 151:6, 152:16, 154:4, 155:17, 157:1, 157:24, 158:5, 158:8, 159:21, 160:13, 160:14, 162:23, 163:7, 163:11, 164:14, 164:23,</p>
<b>M</b>				
<p><b>Magistrate</b> [1] - 5:3</p> <p><b>magnitude</b> [10] - 19:18, 122:18, 122:25, 123:7, 123:15, 123:18, 124:6, 124:9, 134:19, 134:22</p> <p><b>main</b> [4] - 43:15, 104:11, 104:17, 136:22</p> <p><b>maintain</b> [4] - 17:23, 31:3, 32:10, 135:3</p> <p><b>maintained</b> [1] - 198:13</p> <p><b>major</b> [2] - 32:24, 41:19</p> <p><b>majority</b> [1] - 34:13</p> <p><b>makers</b> [1] - 18:20</p> <p><b>man</b> [2] - 25:20, 181:4</p> <p><b>Management</b> [1] - 192:9</p> <p><b>management</b> [3] - 62:6, 100:15, 134:15</p> <p><b>manager</b> [1] - 135:10</p> <p><b>mandates</b> [1] - 43:17</p> <p><b>manifest</b> [1] - 200:25</p> <p><b>manipulate</b> [1] - 109:14</p>				

<p>174:6, 177:18, 181:21, 181:23, 189:3, 189:7, 189:10, 190:9, 195:14, 196:18, 197:25, 198:21, 198:23, 198:25, 199:4, 206:24, 207:11, 207:17, 207:19, 208:1, 208:5, 208:11, 208:13, 208:14, 209:9, 210:10</p> <p><b>market-wide</b> [1] - 33:6</p> <p><b>marketed</b> [2] - 34:2, 66:25</p> <p><b>marketing</b> [1] - 27:14</p> <p><b>marketplace</b> [3] - 36:18, 81:25, 85:3</p> <p><b>markets</b> [50] - 12:8, 12:9, 12:10, 12:14, 12:22, 12:23, 13:4, 13:5, 13:16, 13:17, 13:21, 14:6, 14:9, 15:2, 15:3, 15:7, 17:25, 19:15, 20:1, 21:12, 33:7, 34:6, 34:10, 35:7, 35:24, 50:6, 96:8, 115:4, 126:8, 126:14, 126:18, 135:22, 159:14, 182:5, 187:4, 197:13, 197:14, 197:19, 198:6, 198:8, 198:10, 201:24, 204:25, 205:1, 208:9, 209:12, 209:15</p> <p><b>marriage</b> [2] - 100:25, 166:1</p> <p><b>marshals</b> [1] - 74:25</p> <p><b>Martin</b> [3] - 1:10, 56:12, 131:11</p> <p><b>Mary</b> [1] - 171:1</p> <p><b>massive</b> [10] - 48:20, 67:1, 112:16, 124:12, 125:2, 126:18, 127:15, 127:21, 129:4, 131:13</p> <p><b>massively</b> [1] - 34:17</p> <p><b>matches</b> [1] - 51:13</p> <p><b>material</b> [8] - 10:7, 27:24, 46:5, 70:2, 70:7, 70:8, 149:12, 171:7</p> <p><b>materiality</b> [1] - 202:15</p> <p><b>materially</b> [9] - 46:4,</p>	<p>46:7, 66:8, 66:9, 67:20, 88:4, 90:9, 110:16, 149:19</p> <p><b>materials</b> [1] - 102:20</p> <p><b>matter</b> [16] - 10:16, 11:23, 11:24, 20:18, 26:7, 28:17, 48:7, 53:2, 74:14, 128:9, 135:12, 165:15, 176:18, 180:15, 185:23, 211:22</p> <p><b>matters</b> [7] - 41:12, 51:7, 86:14, 86:23, 104:23, 185:24, 202:2</p> <p><b>maximize</b> [1] - 32:4</p> <p><b>McCabe</b> [1] - 150:9</p> <p><b>McKesson</b> [1] - 121:19</p> <p><b>mean</b> [24] - 53:9, 54:8, 55:16, 57:11, 59:1, 64:12, 75:10, 75:14, 77:13, 78:1, 79:18, 80:5, 83:13, 83:24, 85:18, 87:14, 89:23, 113:23, 137:1, 154:22, 163:13, 170:23, 173:22, 180:16</p> <p><b>meaning</b> [16] - 61:24, 65:18, 73:4, 82:20, 97:15, 100:10, 109:12, 128:15, 128:20, 129:18, 149:23, 152:5, 153:8, 194:9, 198:24, 205:16</p> <p><b>means</b> [13] - 20:6, 54:6, 82:9, 153:6, 157:21, 160:20, 162:25, 180:16, 180:17, 184:21, 189:3, 197:19, 198:10</p> <p><b>meant</b> [8] - 77:1, 79:2, 81:15, 86:20, 95:8, 126:22, 159:2, 162:5</p> <p><b>measure</b> [9] - 30:1, 140:3, 142:6, 142:19, 147:4, 149:24, 158:17, 178:6, 206:6</p> <p><b>measurement</b> [1] - 148:6</p> <p><b>measures</b> [1] - 101:13</p> <p><b>measuring</b> [1] - 205:2</p> <p><b>mechanism</b> [1] - 124:21</p> <p><b>mechanisms</b> [2] - 204:17, 208:10</p>	<p><b>mediate</b> [1] - 95:2</p> <p><b>meet</b> [16] - 8:5, 30:15, 32:20, 43:16, 43:18, 44:1, 47:25, 65:21, 65:23, 93:14, 98:4, 102:1, 136:8, 166:6, 191:19</p> <p><b>meeting</b> [15] - 62:10, 62:17, 98:13, 100:11, 100:19, 102:14, 102:21, 102:25, 103:1, 126:25, 135:17, 135:24, 136:4, 138:2, 138:11</p> <p><b>meetings</b> [5] - 86:14, 126:20, 136:2, 136:3, 136:8</p> <p><b>meets</b> [1] - 15:8</p> <p><b>Melissa</b> [2] - 1:24, 211:24</p> <p><b>melissamormile@ yahoo.com</b> [1] - 1:24</p> <p><b>member</b> [1] - 75:6</p> <p><b>members</b> [2] - 137:5, 176:8</p> <p><b>memo</b> [2] - 63:8, 166:10</p> <p><b>memorialize</b> [1] - 41:5</p> <p><b>memory</b> [3] - 6:16, 95:18</p> <p><b>men</b> [1] - 25:22</p> <p><b>mention</b> [9] - 55:11, 55:22, 94:22, 95:14, 95:25, 106:6, 123:18, 164:9, 185:6</p> <p><b>mentioned</b> [11] - 16:15, 31:19, 32:22, 40:17, 52:15, 52:17, 52:19, 93:24, 120:17, 169:12, 170:12</p> <p><b>mentioning</b> [1] - 34:1</p> <p><b>Merck</b> [1] - 148:24</p> <p><b>mere</b> [12] - 14:11, 14:15, 17:17, 22:18, 23:18, 30:3, 55:10, 67:25, 96:25, 138:23, 155:12, 199:7</p> <p><b>merely</b> [2] - 68:3, 110:14</p> <p><b>merged</b> [2] - 59:20, 115:2</p> <p><b>merger</b> [3] - 58:13, 59:15, 60:1</p> <p><b>mergers</b> [2] - 164:18, 164:19</p> <p><b>merit</b> [1] - 65:9</p> <p><b>meritless</b> [1] - 67:7</p>	<p><b>merits</b> [5] - 57:13, 57:14, 200:7, 200:11, 200:23</p> <p><b>Merrell</b> [1] - 191:9</p> <p><b>met</b> [7] - 28:6, 34:15, 44:1, 106:18, 109:15, 161:6</p> <p><b>metadata</b> [1] - 101:14</p> <p><b>methodological</b> [1] - 200:15</p> <p><b>methodologies</b> [1] - 201:1</p> <p><b>methodology</b> [8] - 141:5, 196:6, 197:6, 197:11, 197:19, 198:10, 198:23, 201:6</p> <p><b>metrics</b> [1] - 98:1</p> <p><b>mic</b> [1] - 6:19</p> <p><b>Michael</b> [2] - 5:20, 6:11</p> <p><b>MICHAEL</b> [2] - 1:18, 3:3</p> <p><b>microphone</b> [1] - 6:18</p> <p><b>might</b> [31] - 25:25, 26:2, 52:22, 54:12, 54:16, 54:19, 56:11, 68:12, 73:17, 73:18, 92:3, 109:8, 109:10, 121:23, 122:1, 126:22, 134:1, 137:1, 153:5, 155:23, 163:24, 173:2, 180:11, 180:18, 180:19, 180:21, 181:13, 194:15, 194:16, 201:14</p> <p><b>Mike</b> [2] - 86:13</p> <p><b>Milbank</b> [1] - 20:21</p> <p><b>mildly</b> [1] - 61:14</p> <p><b>million</b> [5] - 11:5, 17:9, 63:22, 97:21, 211:6</p> <p><b>millions</b> [5] - 20:14, 73:23, 74:5, 113:16, 124:19</p> <p><b>mind</b> [23] - 9:15, 15:21, 16:24, 19:2, 19:16, 38:14, 42:11, 46:19, 47:11, 47:13, 71:19, 79:6, 146:2, 146:5, 146:6, 147:18, 181:8, 186:6, 192:5, 192:11, 202:16, 202:21, 202:22</p> <p><b>mine</b> [1] - 147:22</p> <p><b>Minimal</b> [1] - 78:25</p> <p><b>minimal</b> [8] - 79:3,</p>	<p>113:18, 113:22, 114:9, 114:13, 124:15, 180:16</p> <p><b>minimum</b> [4] - 45:3, 92:24, 180:17</p> <p><b>minor</b> [1] - 146:22</p> <p><b>minute</b> [3] - 40:11, 161:14, 163:18</p> <p><b>minutes</b> [8] - 8:10, 60:22, 94:3, 138:9, 138:11, 138:12, 190:25, 207:7</p> <p><b>mirror</b> [5] - 139:9, 148:18, 148:23, 149:1, 154:18</p> <p><b>mirror-image</b> [1] - 149:1</p> <p><b>mischaracterization</b> [1] - 181:9</p> <p><b>mischaracterize</b> [1] - 10:24</p> <p><b>misconduct</b> [1] - 185:22</p> <p><b>misconstrue</b> [1] - 181:8</p> <p><b>misconstrued</b> [1] - 93:4</p> <p><b>misinformation</b> [1] - 174:6</p> <p><b>misinterpreting</b> [2] - 92:3, 92:4</p> <p><b>misleading</b> [38] - 36:4, 39:22, 42:14, 46:4, 46:7, 48:15, 50:3, 55:11, 66:21, 67:20, 78:8, 78:9, 78:21, 79:6, 83:4, 83:5, 84:22, 84:25, 85:7, 85:15, 87:22, 88:4, 90:9, 110:17, 127:20, 130:2, 130:15, 160:19, 162:6, 178:24, 179:7, 192:24, 193:3, 193:5, 193:13, 193:15, 193:18, 203:8</p> <p><b>misled</b> [1] - 182:2</p> <p><b>misquoted</b> [1] - 166:20</p> <p><b>misread</b> [1] - 200:9</p> <p><b>misreading</b> [1] - 79:11</p> <p><b>misrepresent</b> [1] - 150:18</p> <p><b>misrepresentation</b> [2] - 46:5, 48:4</p> <p><b>misrepresentations</b> [27] - 10:7, 49:1, 111:16, 127:20, 136:23, 137:12,</p>
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<p>139:23, 140:8, 141:11, 143:14, 144:8, 148:10, 148:14, 148:18, 152:22, 154:17, 157:4, 157:10, 177:15, 178:2, 189:6, 189:20, 190:8, 204:24, 205:13, 205:17, 205:22</p> <p><b>misrepresented</b> [5] - 111:18, 111:20, 145:22, 148:7, 203:3</p> <p><b>misrepresenting</b> [1] - 181:21</p> <p><b>misreps</b> [1] - 205:19</p> <p><b>miss</b> [3] - 92:3, 102:13, 105:6</p> <p><b>missed</b> [1] - 85:23</p> <p><b>missing</b> [4] - 85:23, 88:18, 101:23, 181:9</p> <p><b>misspoke</b> [1] - 172:6</p> <p><b>misstated</b> [3] - 25:18, 166:20, 183:15</p> <p><b>misstatement</b> [3] - 51:4, 150:13, 194:12</p> <p><b>misstatements</b> [5] - 35:18, 51:2, 129:22, 139:20, 160:19</p> <p><b>mix</b> [2] - 51:13, 83:17</p> <p><b>mixed</b> [2] - 101:8, 166:22</p> <p><b>model</b> [7] - 97:24, 98:5, 98:6, 98:13, 99:16, 103:15</p> <p><b>moderating</b> [1] - 155:14</p> <p><b>modest</b> [1] - 165:16</p> <p><b>moment</b> [1] - 24:15</p> <p><b>money</b> [2] - 174:14, 174:21</p> <p><b>monitor</b> [3] - 21:16, 22:7, 22:11</p> <p><b>monitoring</b> [4] - 20:11, 20:12, 20:19, 21:2</p> <p><b>month</b> [4] - 59:5, 78:18, 99:7, 107:17</p> <p><b>monthly</b> [2] - 61:1, 75:19</p> <p><b>months</b> [10] - 41:2, 60:7, 71:9, 71:11, 113:16, 155:5, 188:2, 188:3, 201:25</p> <p><b>moreover</b> [3] - 19:24, 25:6, 208:14</p> <p><b>Morgan</b> [2] - 91:7, 97:23</p> <p><b>Mormile</b> [2] - 1:24,</p>	<p>211:24</p> <p><b>morning</b> [9] - 5:11, 5:16, 5:23, 5:24, 6:7, 6:9, 7:21, 159:9, 183:6</p> <p><b>Morning</b> [7] - 5:13, 5:18, 5:20, 6:3, 6:4, 6:6, 6:12</p> <p><b>Morris</b> [1] - 199:8</p> <p><b>Morton</b> [1] - 32:17</p> <p><b>most</b> [15] - 31:20, 38:10, 38:19, 94:15, 96:13, 112:17, 129:13, 136:23, 138:8, 155:1, 177:24, 184:10, 196:11, 198:12, 210:24</p> <p><b>mostly</b> [1] - 124:3</p> <p><b>motion</b> [31] - 6:22, 6:23, 6:24, 6:25, 7:8, 7:10, 7:12, 7:13, 8:12, 26:17, 27:2, 27:25, 28:14, 35:16, 55:23, 67:11, 68:1, 81:2, 108:13, 130:7, 140:13, 149:8, 175:7, 176:3, 177:4, 177:11, 177:17, 179:18, 181:5, 182:10, 185:8</p> <p><b>MOTIONS</b> [1] - 4:10</p> <p><b>motions</b> [7] - 7:5, 7:14, 161:12, 190:19, 190:23, 199:23, 200:24</p> <p><b>motivated</b> [1] - 68:14</p> <p><b>motive</b> [17] - 14:23, 66:2, 66:3, 66:4, 68:12, 68:17, 69:5, 69:8, 69:13, 69:16, 104:14, 104:15, 137:22, 137:24, 174:5, 174:22</p> <p><b>mouth</b> [1] - 191:22</p> <p><b>movant's</b> [1] - 108:12</p> <p><b>move</b> [8] - 20:9, 39:17, 40:15, 67:24, 70:25, 147:25, 181:4, 190:18</p> <p><b>moved</b> [1] - 32:5</p> <p><b>movement</b> [4] - 18:17, 114:4, 114:5, 149:24</p> <p><b>movements</b> [2] - 21:13, 97:3</p> <p><b>moving</b> [3] - 70:14, 154:20, 204:2</p> <p><b>MR</b> [51] - 4:4, 4:5, 4:6, 4:7, 4:8, 4:11, 4:12, 5:11, 5:13, 5:16,</p>	<p>5:18, 5:20, 5:24, 6:4, 6:7, 6:9, 7:9, 7:16, 7:19, 21:21, 35:5, 50:21, 50:24, 64:21, 64:25, 65:1, 94:5, 94:14, 139:5, 139:6, 151:21, 161:16, 161:21, 163:3, 166:16, 175:13, 175:14, 183:2, 183:3, 188:22, 190:18, 190:21, 190:24, 191:2, 191:5, 191:7, 200:2, 208:19, 210:19, 210:21, 211:15</p> <p><b>multi</b> [1] - 29:6</p> <p><b>multi-billion-dollar</b> [1] - 29:6</p> <p><b>multibillion</b> [1] - 36:17</p> <p><b>multinational</b> [1] - 154:19</p> <p><b>multiple</b> [5] - 34:18, 103:7, 114:15, 153:6, 154:19</p> <p><b>multiplied</b> [1] - 181:25</p> <p><b>must</b> [24] - 11:12, 11:13, 11:17, 23:22, 43:17, 44:1, 44:16, 48:3, 49:2, 97:3, 97:11, 102:18, 108:24, 109:8, 110:14, 140:22, 162:11, 177:12, 182:12, 188:15, 188:16, 188:17, 194:10</p> <p><b>must-haves</b> [2] - 108:24, 109:8</p> <p><b>mutual</b> [1] - 13:25</p> <p><b>Myers</b> [2] - 110:8, 186:24</p> <p><b>Mylan</b> [59] - 43:22, 43:24, 44:17, 44:25, 45:1, 45:3, 45:6, 45:11, 45:15, 45:16, 45:22, 46:1, 46:2, 46:13, 46:19, 47:12, 47:14, 68:16, 68:25, 70:12, 70:16, 71:5, 104:13, 104:16, 104:17, 104:21, 107:15, 107:22, 137:25, 138:4, 138:6, 138:17, 139:22, 141:9, 141:13, 141:15, 143:3, 144:11, 144:12, 144:20, 145:4, 145:5,</p>	<p>145:20, 145:22, 145:25, 146:8, 146:11, 146:15, 147:13, 147:15, 164:11, 164:12, 174:3, 174:20, 178:18, 178:21, 179:4, 196:7, 196:8</p> <p><b>Mylan's</b> [9] - 44:12, 45:19, 138:14, 139:23, 146:2, 146:19, 178:25, 179:8, 201:19</p> <p style="text-align: center;"><b>N</b></p> <p><b>N-Y-E</b> [1] - 46:15</p> <p><b>Naar</b> [1] - 6:4</p> <p><b>NAAR</b> [2] - 2:11, 6:4</p> <p><b>nail</b> [1] - 43:20</p> <p><b>name</b> [7] - 7:21, 24:22, 25:20, 50:24, 65:3, 180:13, 191:7</p> <p><b>named</b> [5] - 24:10, 27:5, 27:15, 40:11, 46:15</p> <p><b>namely</b> [1] - 13:13</p> <p><b>narrow</b> [5] - 35:17, 66:7, 67:10, 153:21, 179:24</p> <p><b>narrowed</b> [1] - 8:20</p> <p><b>narrowing</b> [1] - 182:16</p> <p><b>narrowly</b> [2] - 9:7, 9:8</p> <p><b>Nathanson</b> [3] - 97:4, 97:8, 128:24</p> <p><b>natural</b> [2] - 121:25, 125:5</p> <p><b>naturally</b> [4] - 12:8, 13:4, 14:6, 181:22</p> <p><b>nature</b> [12] - 21:3, 21:7, 24:2, 32:12, 33:14, 36:16, 46:8, 137:8, 138:18, 183:25, 184:9, 197:19</p> <p><b>nauseam</b> [1] - 207:24</p> <p><b>NEALS</b> [2] - 1:14, 5:2</p> <p><b>Neals</b> [1] - 5:6</p> <p><b>near</b> [1] - 117:6</p> <p><b>nearly</b> [3] - 26:17, 55:25, 194:18</p> <p><b>necessarily</b> [1] - 32:15</p> <p><b>necessary</b> [8] - 13:19, 46:6, 114:21, 120:8, 156:6, 193:5, 195:17, 203:23</p> <p><b>need</b> [32] - 22:7, 22:8, 59:6, 64:24, 68:2, 70:23, 90:15, 100:25, 101:9,</p>	<p>102:5, 102:7, 102:18, 104:2, 116:15, 116:19, 118:8, 121:14, 134:8, 136:8, 136:25, 153:8, 153:14, 153:24, 157:12, 158:4, 164:19, 165:25, 177:3, 190:22, 194:22, 207:4, 207:18</p> <p><b>needed</b> [6] - 61:3, 83:16, 142:2, 166:2, 166:5, 201:9</p> <p><b>needs</b> [3] - 59:25, 97:9, 122:13</p> <p><b>nefarious</b> [1] - 92:8</p> <p><b>negative</b> [10] - 49:3, 61:14, 97:22, 103:17, 113:7, 113:11, 153:9, 157:24, 196:24, 197:1</p> <p><b>net/net</b> [1] - 34:12</p> <p><b>network</b> [1] - 91:19</p> <p><b>never</b> [36] - 9:15, 9:22, 10:17, 15:21, 16:24, 19:2, 19:15, 25:8, 25:9, 28:5, 28:6, 28:15, 41:9, 41:11, 42:11, 42:22, 42:23, 46:23, 53:12, 53:13, 63:2, 104:4, 109:19, 109:20, 117:2, 124:6, 143:3, 145:5, 147:13, 165:20, 172:14, 174:11, 180:12, 196:3, 207:19, 207:21</p> <p><b>nevertheless</b> [2] - 58:17, 106:20</p> <p><b>new</b> [8] - 13:8, 48:23, 71:6, 90:19, 125:18, 155:13, 155:22</p> <p><b>NEW</b> [1] - 1:1</p> <p><b>New</b> [15] - 1:11, 1:19, 2:4, 2:9, 2:12, 2:22, 3:4, 31:21, 58:9, 122:9, 179:8</p> <p><b>Newark</b> [1] - 1:11</p> <p><b>news</b> [23] - 56:12, 60:24, 61:5, 61:19, 62:24, 64:15, 73:11, 73:16, 87:18, 148:14, 149:18, 150:1, 150:12, 151:4, 151:8, 152:20, 152:22, 153:2, 154:3, 159:9,</p>
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

<p>160:22, 196:13, 206:20</p> <p><b>next</b> [21] - 68:5, 70:25, 73:22, 75:2, 79:8, 80:14, 81:18, 81:21, 82:20, 86:5, 92:21, 100:24, 107:17, 143:1, 154:2, 159:15, 165:25, 167:25, 168:19, 170:10, 171:14</p> <p><b>nice</b> [2] - 92:4, 147:23</p> <p><b>nine</b> [4] - 57:21, 58:1, 60:17, 112:10</p> <p><b>nobody</b> [1] - 125:20</p> <p><b>nobody's</b> [1] - 6:16</p> <p><b>noisy</b> [1] - 182:10</p> <p><b>Nokia</b> [1] - 58:8</p> <p><b>nominally</b> [1] - 106:7</p> <p><b>non</b> [4] - 37:3, 113:22, 114:5, 198:8</p> <p><b>non-accretive</b> [1] - 37:3</p> <p><b>non-culpable</b> [1] - 113:22</p> <p><b>non-movement</b> [1] - 114:5</p> <p><b>non-oligopolistic</b> [1] - 198:8</p> <p><b>nonactionable</b> [1] - 58:10</p> <p><b>nonbinding</b> [4] - 45:23, 46:9, 46:10</p> <p><b>noncollusive</b> [1] - 30:17</p> <p><b>noncompetitive</b> [2] - 137:14, 137:17</p> <p><b>nondisclosure</b> [1] - 144:16</p> <p><b>none</b> [26] - 9:13, 11:10, 17:8, 17:14, 17:15, 18:8, 25:16, 27:17, 28:20, 28:24, 34:19, 36:4, 36:5, 40:2, 65:22, 72:5, 72:10, 75:20, 111:22, 135:25, 137:2, 165:6, 177:1, 197:5, 199:17, 199:21</p> <p><b>noneconomic</b> [1] - 15:11</p> <p><b>nonetheless</b> [1] - 63:16</p> <p><b>nonexclusive</b> [1] - 14:19</p> <p><b>nonmovant</b> [4] - 96:25, 97:3, 100:2, 109:25</p> <p><b>nonmovant's</b> [1] -</p>	<p>128:19</p> <p><b>nonocclusive</b> [1] - 33:5</p> <p><b>nonoligopolistic</b> [1] - 12:21</p> <p><b>nonpublic</b> [5] - 70:2, 70:7, 70:9, 144:15, 144:18</p> <p><b>nonrealistic</b> [1] - 105:18</p> <p><b>nonresponsive</b> [1] - 168:18</p> <p><b>nonspeculative</b> [1] - 206:6</p> <p><b>normal</b> [5] - 14:7, 63:3, 123:15, 134:4, 181:22</p> <p><b>normally</b> [2] - 117:15, 134:6</p> <p><b>Northway</b> [1] - 194:13</p> <p><b>Nostradamus</b> [3] - 42:24, 43:6, 181:12</p> <p><b>note</b> [2] - 6:25, 93:24</p> <p><b>noted</b> [6] - 19:5, 24:24, 103:15, 124:14, 125:8, 130:7</p> <p><b>nothing</b> [39] - 11:18, 17:13, 18:21, 18:22, 19:9, 19:15, 19:20, 21:4, 28:22, 33:2, 35:6, 41:24, 48:23, 52:5, 54:22, 56:15, 57:6, 60:10, 62:20, 63:16, 64:4, 64:12, 68:23, 100:9, 100:20, 105:14, 105:15, 106:21, 123:24, 137:19, 165:4, 176:2, 181:11, 186:13, 196:20</p> <p><b>Nothing</b> [1] - 100:6</p> <p><b>notice</b> [12] - 137:3, 137:10, 175:15, 175:16, 175:22, 175:23, 175:24, 176:19, 184:2, 185:1, 188:9</p> <p><b>notice's</b> [1] - 175:17</p> <p><b>noticeable</b> [1] - 21:6</p> <p><b>notices</b> [2] - 176:8, 176:19</p> <p><b>notion</b> [3] - 8:23, 66:19, 179:13</p> <p><b>notwithstanding</b> [1] - 147:19</p> <p><b>November</b> [12] - 71:5, 74:6, 98:3, 104:11, 107:7, 132:11, 141:17, 141:19,</p>	<p>142:8, 142:11, 146:15, 175:24</p> <p><b>now-dead</b> [1] - 30:2</p> <p><b>nowhere</b> [4] - 52:19, 88:21, 88:22, 117:6</p> <p><b>nullification</b> [1] - 181:24</p> <p><b>nullifying</b> [1] - 182:7</p> <p><b>NUMBER</b> [1] - 1:3</p> <p><b>number</b> [25] - 6:15, 31:10, 31:14, 39:21, 56:14, 66:24, 67:1, 71:10, 111:16, 111:18, 111:19, 116:25, 117:17, 136:19, 143:9, 143:10, 143:15, 167:7, 167:18, 180:1, 182:19, 186:18, 205:20, 205:21</p> <p><b>numbers</b> [3] - 105:23, 142:23, 168:13</p> <p><b>numerous</b> [1] - 38:21</p> <p><b>nuts</b> [3] - 63:17, 166:2, 166:12</p> <p><b>NW</b> [1] - 2:17</p> <p><b>nye</b> [1] - 46:15</p> <p><b>Nye</b> [31] - 6:24, 49:3, 49:20, 50:1, 143:7, 143:22, 147:12, 147:19, 149:21, 152:19, 153:7, 155:25, 156:21, 157:9, 157:20, 158:14, 159:25, 195:1, 195:4, 195:17, 195:18, 196:6, 196:11, 196:13, 197:2, 200:20, 204:2, 204:13, 205:2</p> <p><b>Nye's</b> [10] - 47:6, 47:10, 149:15, 150:23, 160:9, 196:10, 204:10, 204:12, 205:15, 206:17</p>	<p><b>obligation</b> [1] - 193:24</p> <p><b>obligations</b> [1] - 194:25</p> <p><b>obtain</b> [1] - 21:9</p> <p><b>obtained</b> [1] - 29:11</p> <p><b>obvious</b> [3] - 130:14, 130:15, 162:4</p> <p><b>obviously</b> [12] - 55:16, 58:15, 60:3, 77:12, 77:16, 77:19, 129:2, 155:16, 166:6, 183:21, 203:2, 205:11</p> <p><b>occasionally</b> [1] - 18:11</p> <p><b>occasions</b> [1] - 119:22</p> <p><b>occur</b> [1] - 126:7</p> <p><b>occurred</b> [7] - 33:8, 58:13, 60:1, 60:5, 60:23, 126:20, 173:12</p> <p><b>occurring</b> [4] - 12:8, 13:5, 14:6, 181:23</p> <p><b>October</b> [13] - 55:25, 56:7, 66:24, 104:22, 105:5, 105:17, 106:1, 106:15, 114:17, 121:18, 131:8, 132:22, 179:9</p> <p><b>oddly</b> [1] - 149:7</p> <p><b>odds</b> [1] - 198:24</p> <p><b>OF</b> [1] - 1:1</p> <p><b>offensive</b> [1] - 57:6</p> <p><b>offer</b> [94] - 27:10, 27:13, 43:21, 44:6, 45:15, 45:17, 45:19, 45:20, 45:22, 45:25, 46:1, 46:14, 68:16, 68:25, 70:12, 70:17, 71:6, 72:22, 80:1, 91:22, 107:6, 107:15, 107:22, 119:6, 138:4, 138:7, 138:8, 138:17, 139:12, 139:13, 139:16, 139:18, 139:22, 139:23, 140:12, 141:9, 141:13, 141:14, 141:16, 141:19, 141:20, 142:3, 142:7, 142:10, 142:12, 142:20, 143:3, 143:6, 143:14, 144:6, 144:8, 144:11, 144:13, 144:23, 144:24, 145:6, 145:23, 146:1,</p>	<p>146:13, 147:7, 147:14, 174:3, 174:6, 174:8, 174:12, 174:20, 178:19, 178:21, 179:1, 179:14, 189:20, 190:2, 191:15, 195:9, 195:12, 195:15, 195:20, 195:22, 195:23, 196:7, 201:20, 204:8, 204:11, 204:22, 204:23, 205:5, 205:14, 205:19, 205:23, 205:24, 206:2, 206:4</p> <p><b>offer's</b> [1] - 195:11</p> <p><b>offered</b> [8] - 24:16, 34:6, 44:18, 45:3, 125:20, 180:3, 194:19, 204:2</p> <p><b>offering</b> [7] - 164:11, 180:2, 191:24, 201:4, 201:17, 203:9, 203:11</p> <p><b>offers</b> [8] - 140:9, 154:20, 169:16, 194:6, 195:25, 196:4, 204:17, 205:6</p> <p><b>office</b> [11] - 57:23, 57:24, 63:9, 88:16, 100:15, 101:20, 118:5, 118:15, 118:17, 165:16, 165:17</p> <p><b>officer</b> [4] - 86:11, 88:11, 88:12, 100:13</p> <p><b>officers</b> [1] - 117:9</p> <p><b>offices</b> [1] - 118:17</p> <p><b>Official</b> [2] - 1:24, 211:25</p> <p><b>official</b> [1] - 106:2</p> <p><b>OFFICIAL</b> [1] - 211:19</p> <p><b>officials</b> [1] - 23:12</p> <p><b>OFI</b> [1] - 60:12</p> <p><b>often</b> [4] - 33:13, 37:2, 42:6, 110:22</p> <p><b>Ohio</b> [4] - 20:3, 32:17, 124:2, 124:8</p> <p><b>oil</b> [1] - 27:10</p> <p><b>Oil</b> [1] - 199:8</p> <p><b>ointment</b> [5] - 28:20, 28:22, 28:23, 29:3, 29:4</p> <p><b>old</b> [6] - 7:19, 47:1, 50:25, 62:5, 181:4, 211:5</p> <p><b>oligopolistic</b> [41] - 12:8, 12:14, 12:23,</p>
----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------



13:1, 13:5, 13:15,  
13:17, 13:20, 14:6,  
14:9, 14:16, 15:2,  
15:7, 17:25, 19:15,  
20:1, 21:5, 21:12,  
22:5, 32:12, 33:7,  
34:10, 35:7, 181:23,  
182:5, 197:13,  
197:15, 197:19,  
197:25, 198:6,  
198:8, 198:10,  
198:20, 198:22,  
198:25, 207:11,  
207:16, 207:25,  
208:13, 209:13,  
210:11

**oligopoly** [11] - 112:6,  
121:10, 197:22,  
207:20, 208:4,  
208:16, 208:20,  
208:22, 209:1,  
209:6, 209:10

**Omega** [141] - 10:9,  
10:25, 35:12, 36:1,  
36:10, 36:11, 36:16,  
36:22, 36:24, 36:25,  
37:10, 38:17, 39:23,  
40:2, 40:4, 40:15,  
41:20, 41:24, 42:9,  
44:20, 46:21, 48:15,  
48:16, 48:20, 48:23,  
49:6, 49:7, 50:2,  
51:6, 58:14, 59:9,  
61:1, 61:8, 61:10,  
61:22, 62:11, 62:12,  
63:4, 63:7, 63:24,  
66:10, 67:15, 82:21,  
82:22, 83:11, 83:19,  
83:21, 84:11, 85:4,  
85:5, 85:13, 86:2,  
86:12, 89:4, 89:6,  
89:12, 89:13, 89:24,  
90:7, 91:13, 91:15,  
91:16, 96:1, 97:18,  
98:1, 98:3, 98:10,  
98:13, 98:18, 99:12,  
99:17, 100:4,  
100:17, 100:25,  
101:11, 101:25,  
102:14, 103:2,  
103:14, 103:16,  
103:19, 103:20,  
104:1, 104:4, 104:5,  
104:20, 105:11,  
105:14, 105:22,  
106:12, 107:5,  
107:19, 107:25,  
108:2, 108:3, 108:6,  
108:18, 108:21,  
111:5, 112:20,  
137:11, 137:13,

138:9, 152:2,  
152:10, 152:14,  
152:15, 152:18,  
153:22, 154:9,  
154:25, 155:4,  
155:16, 156:20,  
157:5, 157:10,  
157:17, 158:1,  
165:10, 169:21,  
169:25, 170:5,  
170:15, 170:19,  
182:18, 184:7,  
184:8, 184:11,  
186:12, 187:16,  
187:17, 187:21,  
187:22, 188:1,  
188:7, 196:23

**Omega's** [25] - 35:23,  
36:16, 40:7, 42:4,  
59:2, 61:9, 91:18,  
97:20, 98:12, 99:1,  
99:9, 99:15, 101:22,  
102:11, 103:9,  
104:7, 104:9, 105:6,  
109:16, 176:3,  
176:5, 176:15,  
187:8, 187:25

**Omega/BCH** [1] -  
156:21

**omission** [1] - 171:7

**omissions** [4] - 10:8,  
35:18, 130:13,  
177:15

**omits** [1] - 46:5

**omitted** [4] - 83:6,  
99:11, 148:7, 193:4

**Once** [1] - 140:21

**once** [5] - 59:10, 70:3,  
118:11, 174:17,  
192:20

**One** [2] - 1:18, 210:20

**one** [111] - 17:3, 17:21,  
17:24, 22:12, 25:19,  
27:13, 28:19, 31:16,  
34:24, 35:11, 36:13,  
37:7, 43:19, 46:17,  
48:10, 49:19, 51:4,  
55:21, 57:10, 59:11,  
61:14, 62:19, 64:8,  
70:20, 71:10, 73:8,  
76:18, 76:25, 78:24,  
79:8, 82:6, 85:14,  
86:16, 87:14, 88:6,  
91:24, 92:1, 100:14,  
102:4, 104:11,  
105:17, 108:10,  
109:21, 111:16,  
116:25, 118:16,  
118:18, 118:20,  
130:22, 134:22,

141:16, 141:20,  
143:10, 146:14,  
148:8, 150:16,  
151:15, 153:10,  
154:2, 154:22,  
155:3, 155:12,  
155:13, 156:24,  
158:7, 163:15,  
164:8, 165:8,  
167:16, 167:17,  
169:14, 170:6,  
170:10, 171:3,  
171:4, 171:5, 171:6,  
174:1, 176:20,  
176:22, 177:23,  
178:7, 179:11,  
179:16, 181:15,  
185:2, 186:18,  
186:20, 188:6,  
188:14, 188:23,  
189:12, 189:24,  
193:14, 193:20,  
195:12, 203:13,  
206:6, 209:2, 209:4,  
209:7, 209:18,  
210:19

**one's** [1] - 180:4

**one-page** [1] - 27:13

**one-tenth** [1] - 71:10

**ones** [3] - 90:23,  
182:13, 208:3

**online** [10] - 57:21,  
57:22, 58:2, 59:24,  
62:7, 64:10, 165:16,  
184:22

**open** [4] - 42:6, 117:3,  
147:25, 180:19

**opening** [7] - 116:8,  
142:13, 192:3,  
192:25, 193:17,  
197:22, 198:11

**opens** [1] - 159:21

**operate** [1] - 59:11

**operated** [8] - 31:22,  
33:20, 59:9, 67:2,  
129:1, 129:14,  
207:11, 207:16

**operating** [5] - 104:9,  
112:16, 146:20,  
183:20, 207:19

**operation** [2] - 152:15,  
188:5

**operations** [1] - 53:25

**operative** [3] - 176:7,  
182:15

**ophthalmic** [1] -  
209:13

**Ophthalmics** [1] -  
126:16

**opine** [4] - 192:11,

194:24, 203:18,  
204:19  
**opined** [5] - 53:7,  
121:8, 193:3, 194:8,  
194:20  
**opines** [5] - 53:10,  
143:7, 144:8,  
192:23, 193:21  
**opining** [3] - 204:15,  
204:20, 204:21  
**opinion** [19] - 14:18,  
19:5, 29:24, 78:11,  
130:8, 137:1, 176:1,  
176:4, 177:11,  
182:16, 186:22,  
191:15, 193:10,  
194:4, 199:2, 199:6,  
199:16, 201:5,  
203:10

**opinion's** [1] - 200:17

**opinions** [15] - 19:19,  
117:16, 192:16,  
192:21, 192:22,  
194:6, 194:18,  
195:4, 195:7,  
199:18, 201:8,  
202:15, 202:19,  
203:25, 204:11

**opportunities** [19] -  
16:14, 18:16, 20:7,  
40:6, 78:7, 78:13,  
78:14, 78:21, 79:1,  
79:2, 79:3, 113:18,  
113:23, 113:24,  
114:9, 114:12,  
127:4, 132:24,  
183:25

**opportunity** [17] -  
16:16, 16:19, 18:6,  
19:1, 19:7, 43:1,  
43:21, 75:22, 75:24,  
76:17, 89:10, 93:14,  
139:21, 140:14,  
140:22, 143:13,  
178:25

**opposed** [1] - 42:13

**opposing** [3] - 114:5,  
118:6, 118:13

**opposite** [14] - 30:6,  
56:24, 102:22,  
124:13, 125:10,  
129:5, 129:8,  
133:13, 136:6,  
137:3, 162:24,  
163:3, 163:8, 180:9

**opposition** [9] - 7:11,  
81:2, 81:8, 141:7,  
147:9, 150:22,  
171:8, 201:19,  
203:20

**opt** [3] - 56:20, 56:22,  
76:14

**opt-out** [3] - 56:20,  
56:22, 76:14

**optimistic** [1] - 108:7

**ORAL** [1] - 1:5

**Order** [1] - 116:17

**order** [10] - 7:5, 32:10,  
55:19, 137:1,  
175:24, 176:2,  
179:4, 186:18,  
186:20, 186:21

**ordered** [1] - 157:7

**orders** [2] - 137:2,  
137:3

**ordinary** [1] - 68:10

**organization** [4] -  
54:20, 62:1, 134:20,  
162:20

**original** [1] - 45:15

**originally** [2] - 8:21,  
61:16

**otherwise** [2] - 88:19,  
140:23

**ought** [1] - 38:23

**ourselves** [1] - 94:6

**out-of-pocket** [3] -  
43:22, 140:25, 141:4

**outburst** [2] - 62:17,  
62:20

**outcome** [1] - 140:1

**outline** [1] - 108:15

**outset** [3] - 93:11,  
165:2, 200:5

**outside** [8] - 9:16,  
47:23, 61:23, 74:22,  
185:25, 192:1,  
192:15, 201:14

**over-the-counter** [5] -  
49:13, 196:19,  
196:20, 196:25,  
206:13

**overall** [5] - 69:11,  
82:11, 128:13,  
171:11

**overintegrating** [1] -  
61:18

**overlook** [1] - 73:5

**overnight** [4] - 123:6,  
123:8, 123:13,  
123:14

**overpromised** [1] -  
138:13

**overseen** [1] - 9:11

**overstated** [1] -  
165:10

**overstatement** [1] -  
178:2

**overview** [1] - 69:8

**overwhelming** [2] -

<p>53:3, 64:15  <b>overwhelmingly</b> [2] - 114:19, 157:25  <b>own</b> [28] - 13:22, 14:24, 22:10, 24:25, 44:22, 46:22, 47:17, 47:20, 56:10, 69:1, 96:6, 96:18, 96:19, 103:19, 103:22, 104:3, 107:10, 108:8, 109:12, 117:20, 120:16, 127:13, 136:10, 138:6, 162:10, 185:22, 187:7  <b>owned</b> [2] - 31:22, 35:13  <b>owner</b> [1] - 122:19  <b>ownership</b> [2] - 69:17, 195:20  <b>oxygen</b> [3] - 101:12, 187:19, 188:6</p>	<p><b>Papa</b> [182] - 2:22, 6:8, 10:4, 10:21, 37:6, 41:8, 41:10, 41:13, 42:19, 43:12, 48:11, 48:17, 65:4, 65:14, 66:1, 66:7, 66:11, 67:22, 68:13, 68:25, 69:24, 70:24, 71:7, 71:8, 72:6, 72:7, 72:12, 72:14, 72:18, 72:22, 73:19, 74:2, 74:6, 74:8, 75:2, 75:6, 75:15, 75:18, 76:10, 76:17, 77:9, 77:19, 77:21, 78:5, 79:9, 79:14, 79:15, 79:19, 79:25, 81:9, 81:10, 81:14, 81:16, 84:21, 84:25, 85:2, 85:11, 85:15, 86:9, 86:12, 86:18, 87:3, 87:10, 87:11, 87:21, 87:25, 88:3, 88:10, 88:17, 88:18, 89:3, 89:18, 89:20, 89:25, 90:2, 90:7, 90:8, 90:12, 90:21, 91:2, 91:6, 91:12, 92:6, 92:13, 92:19, 93:9, 93:13, 93:18, 95:13, 96:11, 97:11, 98:7, 98:9, 98:11, 99:3, 99:14, 100:5, 100:16, 100:19, 102:15, 103:7, 103:25, 104:5, 104:18, 105:9, 105:18, 105:19, 105:22, 106:3, 106:16, 107:7, 107:10, 107:18, 107:25, 108:6, 108:16, 108:20, 108:23, 109:14, 109:15, 111:6, 111:8, 113:2, 113:9, 113:15, 113:18, 114:16, 126:24, 128:7, 128:25, 130:1, 130:4, 130:20, 130:23, 131:1, 131:24, 132:10, 132:12, 132:17, 132:21, 133:4, 133:8, 133:21, 134:3, 134:12, 134:25, 135:15, 136:13, 138:1, 138:5, 144:2, 152:13, 154:9, 154:23, 154:24,</p>	<p>155:14, 155:24, 157:15, 163:19, 164:10, 166:21, 167:5, 167:11, 169:17, 170:13, 170:21, 171:10, 172:7, 172:11, 172:21, 172:24, 173:7, 173:13, 173:18, 174:1, 174:8, 174:18, 180:7, 184:14, 187:22, 187:25  <b>papa</b> [1] - 13:10  <b>Papa's</b> [20] - 6:24, 48:13, 67:12, 73:3, 76:13, 83:4, 85:1, 85:18, 85:25, 89:2, 128:16, 154:5, 154:16, 156:1, 158:5, 172:10, 172:15, 181:9, 196:14, 196:15  <b>paper</b> [1] - 22:22  <b>papers</b> [13] - 24:24, 33:13, 34:14, 48:9, 50:9, 50:12, 53:4, 138:4, 150:22, 177:19, 178:10, 196:22, 197:17  <b>paragraph</b> [6] - 21:18, 24:10, 81:22, 82:6, 98:14, 146:17  <b>paragraphs</b> [1] - 117:22  <b>parallel</b> [17] - 11:20, 12:6, 12:13, 12:20, 13:18, 14:5, 14:10, 14:16, 14:17, 14:21, 18:9, 129:4, 198:2, 198:5, 198:7, 198:18, 198:25  <b>parallel-pricing</b> [7] - 12:6, 12:20, 14:10, 14:16, 14:17, 14:21, 198:5  <b>parallelism</b> [1] - 199:15  <b>parcel</b> [1] - 50:1  <b>pardon</b> [2] - 27:25, 61:3  <b>Park</b> [1] - 2:21  <b>parse</b> [1] - 153:8  <b>part</b> [18] - 49:25, 57:5, 59:4, 61:25, 99:5, 108:15, 112:6, 118:21, 133:10, 134:4, 138:9, 155:21, 159:6, 167:18, 167:23,</p>	<p>177:20, 184:3, 185:17  <b>partial</b> [1] - 152:18  <b>partially</b> [2] - 67:12, 156:22  <b>participant</b> [1] - 22:6  <b>participate</b> [3] - 13:15, 139:22, 143:13  <b>participating</b> [1] - 36:18  <b>particular</b> [15] - 9:1, 12:10, 30:21, 90:5, 108:9, 122:15, 128:3, 136:25, 156:9, 159:1, 171:23, 173:4, 204:13, 206:24, 208:6  <b>particularly</b> [3] - 21:4, 33:23, 193:13  <b>parties</b> [9] - 34:13, 58:19, 64:22, 94:2, 95:1, 185:2, 192:19, 201:4, 205:10  <b>partner</b> [4] - 5:25, 6:1, 7:22, 107:1  <b>Partners</b> [2] - 39:4  <b>partners</b> [1] - 20:21  <b>parts</b> [3] - 116:24, 134:23, 135:7  <b>party</b> [5] - 96:9, 116:22, 118:6, 118:13, 192:20  <b>party's</b> [2] - 188:14, 192:11  <b>pass</b> [3] - 74:25, 94:25, 129:9  <b>past</b> [7] - 12:14, 16:15, 16:18, 54:5, 167:6, 176:16, 179:12  <b>patience</b> [5] - 37:5, 94:21, 190:14, 200:3, 210:23  <b>patient</b> [1] - 175:10  <b>Paul</b> [1] - 117:17  <b>pause</b> [1] - 19:17  <b>pay</b> [3] - 20:21, 21:13, 44:12  <b>payment</b> [1] - 54:15  <b>peak</b> [3] - 96:14, 113:5, 113:6  <b>peer</b> [1] - 152:16  <b>peers</b> [2] - 149:23, 157:1  <b>pejorative</b> [1] - 183:8  <b>penalties</b> [5] - 124:12, 132:2, 132:5, 134:1, 162:18  <b>penalty</b> [2] - 54:12, 54:15</p>	<p><b>pendency</b> [3] - 30:2, 178:20, 190:2  <b>pending</b> [2] - 117:23, 118:1  <b>Pennsylvania</b> [2] - 18:25, 186:2  <b>PENSION</b> [1] - 1:3  <b>Pension</b> [2] - 39:16, 68:19  <b>People</b> [1] - 76:2  <b>people</b> [34] - 21:12, 21:23, 22:4, 31:8, 31:10, 52:21, 57:7, 61:25, 62:19, 66:18, 73:17, 76:2, 76:3, 83:21, 89:2, 90:19, 93:12, 116:14, 143:11, 143:17, 144:16, 147:18, 151:3, 151:9, 163:19, 164:1, 164:24, 166:5, 167:3, 169:3, 172:9, 180:12, 190:8  <b>people's</b> [4] - 21:24, 22:5, 22:22, 66:19  <b>Per</b> [1] - 121:14  <b>per</b> [8] - 23:2, 28:16, 45:4, 70:10, 141:14, 142:13, 142:17, 144:2  <b>percent</b> [43] - 29:4, 36:23, 49:23, 69:13, 92:10, 99:16, 103:16, 103:17, 103:20, 122:19, 123:6, 123:8, 125:16, 126:1, 127:16, 127:17, 127:24, 134:21, 134:23, 141:22, 142:2, 142:4, 143:8, 143:16, 143:19, 143:21, 150:25, 151:1, 151:6, 151:12, 152:15, 154:14, 156:25, 157:1, 159:12, 175:4, 175:5, 181:25, 205:24  <b>percentage</b> [1] - 29:3  <b>performance</b> [25] - 10:14, 35:23, 46:21, 50:8, 50:10, 64:6, 98:12, 101:5, 107:14, 108:17, 137:11, 137:12, 156:19, 157:6, 158:1, 176:3, 176:5, 176:15, 176:22,</p>
<b>P</b>				
<p><b>p.m</b> [3] - 94:10, 161:18, 211:17  <b>packet</b> [3] - 87:7, 87:8, 88:7  <b>page</b> [35] - 11:6, 11:9, 16:7, 24:9, 27:13, 45:24, 46:1, 65:12, 68:18, 78:4, 81:2, 81:3, 81:4, 81:7, 81:8, 81:14, 82:5, 92:12, 100:23, 118:2, 120:8, 121:5, 124:25, 149:7, 166:25, 167:1, 171:7, 172:3, 172:25, 192:25, 193:17, 203:15, 203:21, 208:5  <b>PAGE</b> [1] - 4:2  <b>pages</b> [11] - 11:5, 73:23, 81:3, 94:21, 107:13, 108:16, 110:9, 122:16, 192:3, 211:10, 211:11  <b>paid</b> [2] - 45:16, 206:2  <b>painful</b> [2] - 59:4, 99:5  <b>painstaking</b> [1] - 152:20  <b>pale</b> [1] - 171:18  <b>palpably</b> [1] - 133:6  <b>pandemic</b> [1] - 5:8  <b>panning</b> [1] - 152:8  <b>pap</b> [1] - 132:25  <b>PAPA</b> [1] - 1:8</p>				

<p>176:24, 186:18, 186:19, 187:6, 187:14, 187:16 <b>performing</b> [2] - 98:1, 99:17 <b>perhaps</b> [2] - 80:18, 124:21 <b>period</b> [38] - 17:21, 25:4, 25:11, 26:19, 36:21, 58:23, 60:16, 65:8, 69:11, 69:13, 69:15, 69:18, 69:21, 69:22, 70:22, 71:9, 71:11, 71:20, 76:9, 80:15, 80:22, 83:13, 92:7, 96:12, 97:17, 98:5, 108:4, 113:2, 113:4, 113:14, 132:7, 132:11, 133:13, 173:20, 198:14, 198:18, 201:24 <b>periods</b> [2] - 165:3, 166:23 <b>perjury</b> [1] - 67:8 <b>Permethrin</b> [1] - 121:13 <b>permethrin</b> [1] - 127:5 <b>permissible</b> [1] - 192:1 <b>permission</b> [1] - 34:25 <b>permit</b> [2] - 162:5, 176:4 <b>permitted</b> [3] - 35:17, 52:23, 179:12 <b>Perrigo</b> [236] - 2:13, 2:18, 6:2, 6:5, 7:1, 7:6, 7:22, 7:24, 8:14, 8:23, 9:14, 9:19, 10:1, 10:7, 10:10, 11:20, 13:13, 15:19, 16:13, 16:25, 17:6, 17:8, 17:9, 17:20, 18:10, 18:20, 20:6, 22:6, 23:2, 25:1, 25:14, 25:15, 25:19, 26:3, 26:20, 27:16, 27:20, 28:3, 28:5, 28:6, 28:8, 28:10, 28:21, 29:4, 29:6, 29:15, 29:17, 29:19, 30:7, 30:18, 30:23, 31:22, 33:10, 33:16, 33:20, 33:25, 34:2, 34:4, 35:14, 36:18, 36:20, 36:22, 36:24, 40:2, 40:4, 40:6, 41:2, 42:11, 44:10, 44:18, 46:4, 46:20, 49:10, 53:23, 56:16,</p>	<p>56:17, 56:25, 58:14, 59:10, 60:7, 61:13, 61:15, 61:18, 63:4, 63:6, 63:7, 63:12, 63:25, 65:14, 66:23, 66:25, 69:3, 70:10, 71:5, 73:17, 74:5, 75:11, 77:14, 80:1, 80:12, 81:10, 85:12, 88:10, 89:7, 96:1, 96:7, 96:14, 97:20, 97:23, 97:25, 98:2, 100:4, 100:25, 102:14, 103:1, 103:3, 103:20, 104:1, 104:11, 104:20, 105:11, 105:13, 106:1, 106:12, 106:14, 106:22, 107:6, 108:6, 109:2, 109:10, 111:9, 112:15, 113:4, 115:4, 115:17, 116:1, 116:6, 117:3, 117:4, 117:11, 119:22, 121:4, 121:16, 121:18, 121:19, 122:1, 122:5, 122:14, 123:17, 123:25, 124:12, 124:18, 125:1, 125:4, 126:2, 126:19, 127:10, 127:18, 129:9, 129:24, 130:1, 131:9, 131:14, 131:16, 134:13, 134:23, 135:1, 135:17, 135:19, 135:21, 136:13, 138:10, 138:12, 138:13, 138:16, 139:14, 139:21, 140:17, 141:13, 141:16, 141:17, 141:21, 141:22, 141:23, 142:9, 142:12, 144:14, 145:20, 146:19, 149:18, 149:23, 149:24, 150:1, 151:4, 151:7, 151:23, 152:9, 152:12, 152:15, 153:20, 155:1, 155:13, 155:15, 156:13, 156:17, 157:14, 159:2, 159:5, 159:11, 159:16, 163:6,</p>	<p>166:4, 168:6, 168:21, 168:23, 170:18, 178:6, 178:20, 178:22, 179:5, 179:24, 182:18, 183:17, 184:10, 187:18, 188:4, 193:3, 196:16, 206:13, 209:1, 209:3, 209:7, 209:11, 209:17, 210:1 <b>Perrigo's</b> [84] - 6:22, 9:24, 10:8, 10:24, 15:22, 15:23, 16:11, 17:10, 18:3, 29:2, 30:20, 31:1, 31:23, 34:7, 36:10, 37:10, 40:8, 42:5, 42:10, 48:12, 48:14, 49:5, 51:5, 84:8, 84:9, 89:11, 91:13, 96:6, 98:16, 99:8, 99:13, 100:16, 101:12, 103:10, 103:19, 103:22, 104:3, 104:23, 108:1, 108:19, 108:25, 109:12, 111:18, 114:19, 115:1, 119:25, 120:1, 121:12, 124:22, 125:6, 125:11, 127:3, 127:10, 127:13, 127:19, 127:21, 129:13, 129:18, 130:21, 130:24, 133:24, 134:10, 134:11, 134:14, 134:15, 137:13, 137:15, 137:24, 138:10, 139:19, 142:1, 142:5, 146:14, 178:3, 178:23, 187:7, 193:5, 196:19, 196:20, 201:19, 207:10, 207:16, 209:20 <b>Perrigo-specific</b> [1] - 151:7 <b>Perrigo/Omega</b> [1] - 91:8 <b>person</b> [11] - 8:18, 28:11, 28:13, 43:10, 52:6, 61:20, 74:10, 76:25, 202:25, 205:5 <b>personal</b> [7] - 28:2, 28:11, 68:22, 107:8, 130:11, 167:18,</p>	<p>167:20 <b>personally</b> [5] - 66:15, 76:1, 105:24, 113:10, 132:25 <b>perspective</b> [2] - 92:15, 201:18 <b>persuade</b> [2] - 81:6, 138:3 <b>Pharma</b> [2] - 10:9 <b>Pharma's</b> [1] - 187:22 <b>pharmaceutical</b> [6] - 12:9, 22:20, 27:4, 56:2, 66:17, 168:15 <b>Pharmaceuticals</b> [2] - 168:22, 191:10 <b>pharmaceuticals</b> [1] - 196:23 <b>pharmacist</b> [1] - 66:16 <b>phase</b> [3] - 12:1, 12:2, 20:17 <b>PhD</b> [1] - 204:5 <b>phenomena</b> [1] - 199:12 <b>phenomenon</b> [1] - 15:6 <b>Philip</b> [1] - 199:8 <b>phobia</b> [2] - 49:21, 153:5 <b>phone</b> [3] - 118:21, 119:4, 120:19 <b>phrase</b> [2] - 39:13, 112:23 <b>pick</b> [3] - 82:17, 180:7, 181:15 <b>picked</b> [4] - 57:3, 82:8, 95:23, 100:16 <b>picture</b> [1] - 83:5 <b>piece</b> [2] - 136:9, 209:4 <b>pieces</b> [5] - 77:3, 153:6, 153:9, 158:2, 158:25 <b>piggyback</b> [1] - 52:11 <b>Pilgrim's</b> [1] - 26:10 <b>pill</b> [1] - 126:11 <b>Piper</b> [1] - 178:17 <b>place</b> [11] - 16:21, 18:8, 25:3, 30:13, 107:20, 119:24, 120:20, 145:21, 181:6, 183:13, 196:16 <b>places</b> [1] - 117:8 <b>plagued</b> [2] - 83:22, 83:23 <b>plain</b> [14] - 48:5, 82:20, 97:15, 100:10, 109:12, 128:15, 128:20, 129:18, 129:23,</p>	<p>167:2, 171:9, 171:15, 171:17 <b>plainly</b> [1] - 10:14 <b>plaintiff</b> [6] - 36:1, 47:2, 110:14, 140:21, 160:2, 171:22 <b>plaintiffs</b> [28] - 10:6, 12:24, 18:2, 20:6, 28:18, 29:25, 33:8, 34:20, 35:8, 40:24, 41:5, 47:8, 49:4, 50:15, 51:13, 55:22, 64:16, 65:9, 73:2, 101:10, 175:16, 176:23, 180:6, 191:19, 197:10, 199:24, 201:20, 201:22 <b>plaintiffs</b> [139] - 5:12, 5:15, 5:17, 5:19, 5:22, 8:5, 8:14, 8:21, 9:1, 9:17, 10:12, 10:23, 11:19, 11:24, 12:3, 13:20, 14:10, 14:14, 15:13, 15:14, 15:17, 15:18, 16:4, 16:5, 16:8, 16:11, 17:1, 17:14, 17:16, 17:19, 17:25, 18:6, 19:10, 19:17, 20:15, 21:11, 21:18, 22:14, 22:15, 22:18, 22:24, 23:7, 24:8, 24:18, 25:8, 25:16, 26:4, 27:13, 28:9, 28:13, 29:8, 29:13, 30:12, 30:13, 32:20, 33:16, 33:25, 34:6, 34:8, 34:15, 34:18, 35:3, 35:5, 35:17, 36:9, 36:13, 37:8, 38:2, 38:8, 38:10, 39:21, 40:9, 40:18, 41:3, 41:15, 42:15, 42:20, 43:11, 43:20, 44:5, 44:7, 44:17, 44:21, 45:8, 45:19, 46:12, 47:10, 48:12, 50:9, 51:17, 52:13, 52:16, 53:3, 54:2, 55:6, 56:19, 56:20, 56:23, 58:17, 59:1, 60:6, 62:9, 65:17, 69:4, 71:21, 72:7, 76:13, 76:14, 78:19, 83:3, 84:21, 88:2, 91:22, 92:1, 92:3, 92:5, 93:3, 94:15, 101:15, 139:7, 150:10, 162:7, 162:12,</p>
-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

<p>164:21, 176:4, 176:14, 177:3, 177:5, 177:9, 177:11, 179:10, 181:16, 182:12, 182:25, 189:25, 191:21, 197:16, 203:7, 205:11</p> <p><b>Plaintiffs</b> [10] - 1:6, 1:19, 2:5, 2:9, 27:6, 32:8, 76:10, 77:20, 100:2, 149:8</p> <p><b>plan</b> [18] - 69:25, 70:3, 70:4, 70:5, 70:6, 70:7, 70:8, 70:13, 70:15, 70:16, 71:6, 71:8, 71:14, 85:13, 104:2, 109:18, 174:16, 174:19</p> <p><b>plane</b> [1] - 166:6</p> <p><b>planned</b> [4] - 38:4, 107:14, 127:14, 139:8</p> <p><b>planning</b> [1] - 85:17</p> <p><b>plans</b> [1] - 170:19</p> <p><b>plausible</b> [4] - 119:6, 128:16, 135:3, 135:12</p> <p><b>play</b> [6] - 9:21, 29:8, 127:18, 197:23, 198:1, 198:23</p> <p><b>players</b> [1] - 32:24</p> <p><b>playing</b> [2] - 56:2, 65:19</p> <p><b>plead</b> [5] - 35:25, 49:2, 56:5, 56:6, 163:6</p> <p><b>pleading</b> [4] - 9:8, 104:14, 110:11, 187:3</p> <p><b>pleadings</b> [5] - 10:15, 26:24, 48:22, 110:21, 130:17</p> <p><b>pleased</b> [6] - 38:18, 85:4, 85:8, 85:19, 86:1, 86:19</p> <p><b>pleasure</b> [1] - 211:1</p> <p><b>pled</b> [7] - 8:21, 26:15, 26:20, 163:5, 163:8, 182:12, 182:13</p> <p><b>plenty</b> [1] - 110:3</p> <p><b>plays</b> [1] - 112:25</p> <p><b>plus</b> [6] - 14:19, 15:3, 15:7, 16:4, 89:12, 141:15</p> <p><b>Plyley</b> [1] - 74:7</p> <p><b>pocket</b> [3] - 43:22, 140:25, 141:4</p> <p><b>podium</b> [1] - 50:17</p> <p><b>point</b> [56] - 17:3, 37:16, 43:15, 52:10,</p>	<p>52:18, 53:21, 62:9, 62:12, 64:7, 67:4, 67:16, 72:16, 73:6, 73:9, 73:11, 78:4, 78:19, 78:23, 81:24, 84:16, 84:17, 85:10, 86:5, 86:6, 86:18, 87:14, 88:2, 88:5, 89:1, 90:4, 93:6, 126:10, 137:20, 138:10, 138:25, 139:3, 146:10, 147:23, 153:3, 157:6, 157:19, 165:8, 166:1, 166:23, 176:18, 177:23, 182:4, 193:20, 198:17, 208:3, 209:15, 209:18, 211:11</p> <p><b>pointed</b> [3] - 51:21, 114:7, 130:9</p> <p><b>pointing</b> [1] - 79:5</p> <p><b>points</b> [7] - 36:6, 92:23, 129:11, 136:15, 142:21, 202:14, 208:25</p> <p><b>Police</b> [2] - 37:21, 116:17</p> <p><b>policies</b> [1] - 14:3</p> <p><b>policy</b> [1] - 15:23</p> <p><b>Polman</b> [7] - 24:22, 24:23, 25:3, 25:14, 25:23, 25:25, 26:11</p> <p><b>Polman's</b> [1] - 25:12</p> <p><b>POMERANTZ</b> [1] - 2:2</p> <p><b>Pomerantz</b> [2] - 5:12, 5:17</p> <p><b>poor</b> [4] - 152:1, 152:13, 156:17, 156:18</p> <p><b>portfolio</b> [14] - 67:1, 78:6, 78:12, 79:20, 80:2, 80:5, 80:11, 80:19, 81:11, 81:17, 82:7, 82:11, 128:5, 181:10</p> <p><b>portfolio-wide</b> [2] - 79:20, 81:11</p> <p><b>portfolios</b> [2] - 29:2, 80:23</p> <p><b>portion</b> [3] - 47:25, 82:17, 130:22</p> <p><b>portions</b> [1] - 120:13</p> <p><b>portrayed</b> [2] - 90:16</p> <p><b>pose</b> [1] - 207:14</p> <p><b>posited</b> [1] - 207:10</p> <p><b>position</b> [2] - 69:3, 167:13</p> <p><b>positions</b> [1] - 200:10</p>	<p><b>positive</b> [8] - 61:7, 61:10, 61:13, 63:17, 64:15, 87:24, 99:11, 99:18</p> <p><b>positively</b> [2] - 104:5, 113:25</p> <p><b>possessed</b> [1] - 191:16</p> <p><b>possesses</b> [1] - 204:13</p> <p><b>possession</b> [1] - 202:25</p> <p><b>possible</b> [8] - 21:9, 31:15, 159:6, 164:21, 173:11, 173:12, 211:8</p> <p><b>possibly</b> [2] - 103:21, 162:19</p> <p><b>post</b> [2] - 34:24, 178:15</p> <p><b>postmortem</b> [4] - 88:13, 92:14, 108:20, 109:1</p> <p><b>postoperatively</b> [2] - 178:13, 179:3</p> <p><b>posts</b> [1] - 65:7</p> <p><b>potential</b> [7] - 14:20, 18:16, 29:19, 39:23, 137:4, 148:21, 195:20</p> <p><b>pour</b> [1] - 144:18</p> <p><b>power</b> [3] - 171:16, 171:17, 184:12</p> <p><b>powerful</b> [2] - 74:11, 115:7</p> <p><b>PowerPoint</b> [5] - 65:1, 65:6, 87:9, 87:10, 87:24</p> <p><b>practical</b> [1] - 32:4</p> <p><b>practice</b> [5] - 74:8, 106:9, 123:3, 131:14, 131:15</p> <p><b>practices</b> [9] - 111:18, 112:2, 112:3, 115:6, 137:14, 137:18, 187:10, 187:12, 209:22</p> <p><b>prayed</b> [1] - 29:9</p> <p><b>pre</b> [2] - 97:18, 185:8</p> <p><b>pre-acquisition</b> [1] - 97:18</p> <p><b>pre-motion</b> [1] - 185:8</p> <p><b>preceded</b> [2] - 26:19, 145:16</p> <p><b>precedent</b> [1] - 129:20</p> <p><b>precise</b> [1] - 116:22</p> <p><b>precisely</b> [4] - 15:4, 15:14, 24:6, 166:1</p> <p><b>preclosing</b> [3] - 58:18, 60:25, 85:11</p>	<p><b>preclosure</b> [1] - 61:3</p> <p><b>preclude</b> [1] - 201:4</p> <p><b>predict</b> [1] - 42:24</p> <p><b>predicted</b> [1] - 151:20</p> <p><b>prediction</b> [1] - 181:12</p> <p><b>predictions</b> [2] - 37:24, 43:6</p> <p><b>preestablished</b> [1] - 123:3</p> <p><b>prefer</b> [1] - 186:10</p> <p><b>preference</b> [2] - 7:7, 7:9</p> <p><b>preintegration</b> [4] - 58:23, 60:23, 61:2, 165:9</p> <p><b>preliminary</b> [3] - 51:7, 156:13, 178:15</p> <p><b>premise</b> [4] - 39:8, 44:8, 58:5, 207:20</p> <p><b>premised</b> [3] - 8:23, 179:13, 198:5</p> <p><b>premising</b> [1] - 163:9</p> <p><b>premium</b> [2] - 142:20, 164:17</p> <p><b>prepared</b> [1] - 23:23</p> <p><b>preposterous</b> [2] - 66:22, 164:7</p> <p><b>prescription</b> [24] - 12:11, 34:3, 34:7, 34:10, 96:13, 112:17, 112:19, 113:5, 113:19, 114:18, 121:7, 124:23, 126:7, 126:10, 126:14, 129:1, 129:21, 130:5, 130:10, 131:25, 132:18, 133:23, 133:25, 137:15</p> <p><b>prescriptions</b> [2] - 31:10, 31:15</p> <p><b>presence</b> [5] - 36:19, 89:8, 89:9, 89:10</p> <p><b>present</b> [20] - 7:23, 8:12, 9:13, 10:9, 15:6, 35:1, 35:19, 41:11, 42:16, 51:5, 67:10, 67:14, 68:2, 95:5, 115:7, 115:18, 115:20, 138:19, 143:5, 182:17</p> <p><b>presentation</b> [10] - 57:4, 92:6, 104:8, 132:8, 165:2, 166:24, 170:3, 170:17, 177:22, 187:21</p> <p><b>presented</b> [12] - 16:25, 17:6, 83:5,</p>	<p>92:22, 92:23, 92:25, 115:9, 115:12, 116:7, 133:1, 147:4</p> <p><b>presenting</b> [1] - 156:11</p> <p><b>presently</b> [1] - 67:8</p> <p><b>presents</b> [1] - 130:14</p> <p><b>president</b> [10] - 53:25, 75:5, 98:16, 99:13, 103:14, 108:1, 124:23, 138:10, 155:23, 168:12</p> <p><b>presiding</b> [1] - 5:6</p> <p><b>pressed</b> [2] - 105:5, 122:10</p> <p><b>pressure</b> [4] - 106:14, 106:15, 125:24, 134:14</p> <p><b>pressures</b> [2] - 131:10, 157:25</p> <p><b>presumes</b> [1] - 145:3</p> <p><b>presumptively</b> [1] - 120:6</p> <p><b>pretend</b> [2] - 34:9, 123:16</p> <p><b>pretty</b> [5] - 51:14, 58:25, 77:7, 182:23, 195:21</p> <p><b>prevail</b> [2] - 82:22, 82:24</p> <p><b>prevaricated</b> [1] - 17:15</p> <p><b>prevented</b> [1] - 92:9</p> <p><b>previous</b> [2] - 48:14, 81:22</p> <p><b>previously</b> [3] - 88:20, 105:6, 148:7</p> <p><b>price</b> [181] - 9:3, 9:7, 9:12, 9:14, 11:17, 11:20, 12:19, 12:21, 15:21, 15:24, 17:17, 17:22, 17:23, 18:22, 19:12, 19:17, 19:18, 19:21, 19:25, 20:2, 20:11, 20:12, 21:13, 22:7, 25:13, 26:16, 26:21, 30:12, 30:15, 30:17, 30:19, 31:23, 32:22, 44:13, 44:18, 44:25, 45:1, 45:4, 49:8, 49:15, 49:18, 49:23, 51:21, 52:1, 52:3, 52:7, 52:9, 53:1, 53:7, 53:9, 54:7, 54:9, 54:18, 54:23, 55:1, 55:7, 55:9, 55:12, 55:19, 56:13, 56:15, 56:16, 56:25, 57:2, 57:5, 57:8, 57:12, 57:14,</p>
-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------



64:11, 66:9, 70:10,  
71:23, 72:1, 72:3,  
72:11, 72:14, 73:3,  
73:12, 73:20, 74:2,  
74:15, 74:17, 74:19,  
74:20, 75:1, 75:21,  
76:12, 77:7, 77:19,  
79:1, 79:3, 112:16,  
116:1, 117:12,  
118:19, 122:15,  
122:18, 122:24,  
123:1, 123:5, 123:9,  
123:12, 123:13,  
123:14, 123:19,  
124:3, 124:6,  
124:13, 124:18,  
125:10, 125:16,  
125:17, 125:24,  
126:6, 126:18,  
126:20, 127:15,  
127:16, 127:22,  
127:24, 129:4,  
131:13, 132:1,  
132:3, 132:6, 134:1,  
134:5, 134:10,  
134:19, 134:20,  
134:22, 135:2,  
135:5, 135:6,  
135:16, 136:1,  
136:4, 142:9,  
149:19, 150:13,  
150:20, 158:18,  
160:5, 160:7,  
161:24, 162:10,  
162:14, 162:16,  
162:24, 162:25,  
163:15, 163:22,  
164:10, 164:12,  
164:20, 172:14,  
173:21, 174:4,  
174:14, 174:20,  
174:24, 175:4,  
178:3, 178:6, 178:7,  
182:19, 183:18,  
195:14, 196:8,  
197:3, 198:2, 198:7,  
198:14, 198:16,  
199:13, 206:15,  
206:24, 210:13  
**price-fixing** [23] - 9:3,  
9:7, 9:12, 9:14,  
11:17, 55:7, 55:9,  
55:12, 55:19, 57:2,  
57:5, 57:8, 57:14,  
72:1, 72:3, 75:21,  
77:7, 160:5, 162:14,  
162:24, 162:25,  
163:15, 182:19  
**prices** [43] - 10:1,  
15:1, 16:5, 16:23,  
20:7, 20:19, 20:25,

21:6, 21:22, 21:25,  
22:5, 22:7, 22:11,  
25:15, 31:12, 31:13,  
32:5, 33:17, 54:8,  
54:14, 73:17, 73:18,  
78:2, 96:7, 107:8,  
115:3, 120:23,  
123:5, 123:11,  
123:21, 123:22,  
129:24, 130:10,  
135:19, 135:21,  
159:4, 162:17,  
162:18, 163:1,  
163:14, 209:4,  
209:16  
**PricewaterhouseCo  
oper** [2] - 97:19, 99:7  
**pricing** [158] - 8:24,  
10:5, 11:2, 11:7,  
12:6, 12:13, 12:20,  
13:18, 13:22, 14:2,  
14:3, 14:6, 14:10,  
14:16, 14:17, 14:21,  
15:20, 17:2, 17:10,  
18:22, 21:2, 21:5,  
21:10, 21:16, 22:1,  
22:8, 25:19, 26:4,  
29:1, 29:25, 30:20,  
30:23, 30:24, 31:1,  
31:3, 31:5, 31:9,  
31:17, 32:3, 32:25,  
33:4, 33:5, 51:3,  
51:16, 53:22, 53:23,  
54:4, 54:12, 55:9,  
55:11, 55:16, 56:1,  
56:14, 56:16, 64:14,  
67:13, 72:8, 73:11,  
73:15, 73:16, 75:2,  
75:3, 75:5, 75:6,  
75:7, 75:8, 75:12,  
75:15, 77:6, 78:6,  
78:7, 78:10, 78:13,  
78:14, 78:15, 78:20,  
78:21, 79:16, 79:20,  
80:2, 80:8, 80:11,  
80:17, 80:19, 81:17,  
81:24, 82:1, 82:2,  
82:12, 96:12,  
111:19, 112:5,  
113:3, 113:5, 113:6,  
113:11, 113:13,  
113:16, 113:18,  
113:22, 113:23,  
113:25, 114:8,  
114:9, 114:12,  
114:17, 122:21,  
127:19, 128:14,  
130:6, 130:20,  
130:21, 130:24,  
130:25, 131:2,  
131:3, 131:10,

131:25, 132:16,  
132:18, 132:23,  
132:24, 133:23,  
134:14, 135:9,  
137:14, 143:22,  
156:18, 157:11,  
163:13, 172:7,  
172:17, 172:19,  
172:25, 173:2,  
173:7, 177:4,  
177:16, 177:18,  
181:10, 183:25,  
197:11, 198:5,  
198:7, 198:13,  
198:15, 198:17,  
198:18, 198:25,  
199:11, 207:23,  
208:9, 208:11,  
208:21, 209:16  
**Pricing** [2] - 73:10,  
127:4  
**Pride** [1] - 26:10  
**primarily** [1] - 36:24  
**primary** [2] - 145:1,  
207:8  
**principles** [1] - 158:15  
**private** [1] - 62:13  
**Private** [2] - 35:21  
**probative** [9] - 12:21,  
22:2, 30:3, 30:6,  
68:3, 71:18, 73:19,  
82:16, 126:4  
**probe** [1] - 159:23  
**problem** [11] - 58:20,  
58:21, 59:22, 100:8,  
100:9, 102:11,  
111:15, 138:17,  
165:10, 166:4,  
169:21  
**problems** [30] - 40:1,  
42:17, 48:20, 83:22,  
83:23, 83:24, 87:5,  
96:2, 96:4, 97:18,  
101:4, 101:6, 102:8,  
103:2, 105:15,  
106:22, 108:3,  
108:17, 108:21,  
152:18, 165:5,  
169:25, 170:6,  
187:15, 187:18,  
187:24, 188:4  
**proceed** [8] - 7:5, 9:6,  
22:14, 30:1, 35:17,  
39:14, 94:13, 179:12  
**proceeding** [2] -  
10:22, 101:20  
**proceedings** [3] -  
22:16, 211:17,  
211:22  
**PROCEEDINGS** [1] -

5:1  
**process** [14] - 37:25,  
38:21, 57:22, 59:17,  
59:21, 101:23,  
102:19, 146:21,  
148:6, 165:9, 170:1,  
201:18, 207:3,  
207:13  
**processes** [3] - 13:8,  
30:18, 78:1  
**produce** [1] - 101:14  
**produced** [4] - 11:5,  
17:2, 17:9, 73:24  
**product** [18] - 9:24,  
18:19, 19:14, 24:2,  
29:5, 31:3, 40:7,  
77:18, 81:11, 82:10,  
121:15, 128:10,  
128:12, 157:19,  
158:11, 158:16,  
171:12, 182:1  
**production** [1] -  
101:14  
**products** [30] - 10:2,  
13:4, 13:6, 13:13,  
17:3, 17:8, 19:13,  
19:14, 27:15, 30:21,  
34:2, 34:3, 34:4,  
34:8, 40:6, 66:25,  
67:1, 77:24, 79:17,  
89:11, 89:13, 115:6,  
125:14, 125:15,  
134:14, 163:23,  
182:19, 208:9,  
208:13, 208:22  
**professed** [1] - 32:12  
**profession** [1] -  
201:18  
**professional** [1] -  
206:21  
**professor** [1] - 189:8  
**proffered** [2] - 121:24,  
202:19  
**profit** [1] - 33:6  
**profitability** [2] -  
183:20, 183:24  
**profitable** [3] - 96:14,  
112:17, 183:18  
**profits** [2] - 112:17,  
113:5  
**progress** [3] - 58:10,  
61:13, 87:19  
**progressed** [2] -  
38:13, 113:13  
**progressing** [2] -  
38:3, 60:24  
**prohibited** [2] -  
108:13, 184:16  
**prohibition** [3] -  
15:25, 16:1

**prohibits** [1] - 195:8  
**project** [3] - 60:24,  
86:1, 154:10  
**projects** [5] - 38:18,  
85:5, 87:13, 87:18,  
87:25  
**promises** [3] - 102:22,  
146:17, 180:23  
**proof** [16] - 16:24,  
20:16, 34:15, 45:16,  
47:19, 69:16, 73:3,  
73:4, 75:9, 78:19,  
85:9, 88:3, 89:19,  
92:18, 110:23,  
111:22  
**proper** [4] - 116:9,  
175:7, 192:7, 203:17  
**properly** [2] - 129:17,  
207:9  
**proponent** [2] -  
116:15, 118:8  
**propose** [3] - 8:11,  
142:6, 190:18  
**proposed** [1] - 178:18  
**proposition** [6] - 20:4,  
23:20, 24:5, 26:11,  
27:11, 45:21  
**prosecuting** [1] -  
83:14  
**prosecution** [9] -  
27:3, 27:7, 27:8,  
27:19, 29:19, 52:18,  
115:14, 115:15,  
135:20  
**prosecutor** [1] - 83:14  
**prosecutors** [1] -  
159:4  
**prospects** [2] - 46:20,  
155:15  
**protected** [1] - 35:20  
**provably** [1] - 67:17  
**prove** [22] - 10:20,  
11:16, 14:14, 15:13,  
15:14, 16:4, 16:6,  
30:13, 33:16, 42:18,  
48:9, 50:15, 60:13,  
67:18, 68:6, 68:11,  
73:21, 89:16, 90:1,  
90:2, 150:6, 150:7  
**proved** [2] - 91:21,  
96:25  
**proven** [3] - 55:8,  
55:10, 72:9  
**proves** [3] - 85:15,  
87:10, 89:19  
**provide** [6] - 91:16,  
121:3, 136:11,  
140:9, 179:5, 192:4  
**provided** [12] - 18:9,  
91:12, 118:22,

<p>121:2, 125:21, 142:21, 144:17, 150:5, 160:6, 201:22, 202:12, 206:2</p> <p><b>provides</b> [2] - 140:1, 140:2</p> <p><b>providing</b> [1] - 202:15</p> <p><b>province</b> [2] - 184:19, 204:18</p> <p><b>proving</b> [3] - 51:18, 64:16, 149:9</p> <p><b>proximal</b> [1] - 127:9</p> <p><b>proximity</b> [3] - 17:17, 17:24, 127:10</p> <p><b>proxy</b> [1] - 157:23</p> <p><b>prudence</b> [1] - 149:1</p> <p><b>Przybylowski</b> [1] - 5:17</p> <p><b>PRZYBYLOWSKI</b> [2] - 2:3, 5:16</p> <p><b>PSLRA</b> [1] - 110:11</p> <p><b>PSLRA's</b> [1] - 187:2</p> <p><b>public</b> [33] - 21:21, 23:12, 37:2, 56:17, 62:13, 62:15, 68:14, 70:1, 83:12, 83:13, 83:15, 84:6, 84:15, 89:4, 90:9, 91:7, 91:11, 91:15, 118:5, 118:15, 118:16, 118:17, 119:7, 160:17, 160:21, 161:4, 161:5, 193:5, 204:25, 205:1, 206:18, 209:20</p> <p><b>publicly</b> [3] - 46:3, 55:5, 71:16</p> <p><b>publish</b> [1] - 118:24</p> <p><b>published</b> [5] - 106:2, 106:16, 106:20, 133:8, 196:3</p> <p><b>PUC</b> [1] - 176:10</p> <p><b>puffery</b> [1] - 58:11</p> <p><b>pull</b> [1] - 67:5</p> <p><b>Purcell</b> [21] - 6:23, 144:7, 146:3, 146:6, 191:20, 191:21, 191:23, 192:4, 192:13, 192:19, 193:2, 194:5, 194:8, 194:19, 195:3, 201:16, 202:5, 202:13, 202:21, 203:11</p> <p><b>Purcell's</b> [13] - 191:25, 192:6, 192:10, 192:16, 192:21, 192:22, 193:6, 193:8, 193:21,</p>	<p>202:1, 202:19, 203:6, 203:23</p> <p><b>purchase</b> [2] - 21:22, 154:25</p> <p><b>purchaser</b> [1] - 145:16</p> <p><b>pure</b> [4] - 19:23, 42:20, 145:23, 173:22</p> <p><b>purport</b> [1] - 161:3</p> <p><b>purported</b> [2] - 196:8, 203:6</p> <p><b>purportedly</b> [1] - 200:14</p> <p><b>purpose</b> [5] - 96:24, 107:6, 140:1, 140:6, 175:22</p> <p><b>purposely</b> [1] - 140:6</p> <p><b>purposes</b> [1] - 6:13</p> <p><b>pursuant</b> [3] - 70:2, 71:7, 118:10</p> <p><b>pursue</b> [3] - 77:9, 175:25, 176:4</p> <p><b>push</b> [2] - 105:18, 162:7</p> <p><b>pushback</b> [1] - 105:21</p> <p><b>put</b> [42] - 11:3, 12:3, 16:17, 20:17, 22:14, 30:13, 33:18, 34:23, 39:12, 41:16, 41:24, 44:13, 47:7, 47:8, 49:10, 58:16, 65:10, 65:16, 66:11, 72:11, 73:1, 76:6, 77:10, 81:4, 84:5, 88:5, 92:12, 105:23, 108:8, 108:11, 115:11, 130:22, 136:18, 146:22, 152:10, 169:12, 170:11, 171:5, 182:11, 183:9, 202:6</p> <p><b>putting</b> [5] - 11:8, 41:3, 92:4, 166:3, 166:9</p> <p><b>puzzle</b> [1] - 136:9</p> <p><b>PWC</b> [1] - 97:21</p>	<p><b>Qualified</b> [1] - 195:19</p> <p><b>qualify</b> [2] - 23:21, 129:17</p> <p><b>quantification</b> [1] - 143:20</p> <p><b>Quarter</b> [3] - 63:23, 63:24</p> <p><b>quarter</b> [13] - 36:21, 63:24, 71:12, 71:13, 99:15, 106:5, 106:8, 106:12, 132:19, 151:24, 156:14, 175:1</p> <p><b>quarterly</b> [4] - 59:18, 61:1, 75:19, 103:6</p> <p><b>questions</b> [16] - 64:19, 76:10, 76:11, 76:20, 76:24, 93:20, 93:22, 95:21, 130:9, 138:25, 139:3, 145:12, 169:10, 170:9, 175:11, 175:12</p> <p><b>quick</b> [2] - 6:13, 183:14</p> <p><b>quickly</b> [5] - 49:10, 67:24, 89:17, 170:12, 171:4</p> <p><b>quintessential</b> [1] - 23:25</p> <p><b>quite</b> [14] - 26:9, 31:20, 38:16, 47:2, 55:17, 58:15, 69:10, 80:12, 107:19, 126:13, 165:18, 176:6, 211:1, 211:5</p> <p><b>quotations</b> [1] - 193:2</p> <p><b>quote</b> [105] - 11:22, 13:18, 13:25, 14:22, 19:5, 21:8, 26:17, 27:18, 27:20, 28:14, 30:2, 32:1, 32:10, 32:22, 32:23, 32:24, 37:24, 39:7, 39:24, 40:18, 42:16, 46:2, 68:20, 68:21, 70:19, 70:22, 71:14, 72:7, 75:12, 81:9, 81:13, 81:18, 81:24, 85:4, 100:6, 100:7, 102:2, 102:21, 102:22, 103:1, 103:3, 104:1, 105:8, 105:12, 105:18, 105:19, 105:20, 105:24, 106:11, 106:12, 107:14, 109:3, 109:10, 109:17, 110:14, 116:16, 121:21, 127:4,</p>	<p>128:11, 129:2, 130:11, 134:2, 134:6, 134:16, 138:12, 138:13, 138:14, 146:14, 155:12, 166:19, 170:4, 170:15, 172:8, 173:6, 177:6, 178:22, 188:1, 191:16, 191:17, 192:11, 192:13, 192:19, 193:9, 193:18, 194:9, 194:10, 194:16, 195:19, 195:21, 195:24, 196:1, 197:23, 198:12, 198:15, 199:2, 199:7, 199:10, 199:14, 199:18</p> <p><b>quoted</b> [1] - 141:7</p> <p><b>quotes</b> [2] - 9:6, 24:5</p> <p><b>quoting</b> [1] - 194:10</p>	<p><b>reach</b> [6] - 120:8, 133:7, 186:10, 201:10, 201:15, 206:4</p> <p><b>reached</b> [3] - 70:10, 206:23, 207:12</p> <p><b>reaches</b> [2] - 205:1, 207:2</p> <p><b>reaching</b> [2] - 189:9, 203:5</p> <p><b>reaction</b> [2] - 95:21, 163:24</p> <p><b>reactions</b> [2] - 150:20, 157:24</p> <p><b>read</b> [7] - 45:21, 45:22, 81:4, 108:10, 165:21, 165:22, 165:24</p> <p><b>readily</b> [1] - 153:25</p> <p><b>reading</b> [4] - 48:5, 84:15, 121:25, 152:23</p> <p><b>ready</b> [1] - 94:13</p> <p><b>real</b> [3] - 36:19, 183:14, 183:17</p> <p><b>realities</b> [1] - 178:11</p> <p><b>reality</b> [2] - 65:21, 199:4</p> <p><b>realize</b> [2] - 90:13, 126:21</p> <p><b>realizing</b> [1] - 39:23</p> <p><b>really</b> [39] - 9:17, 24:15, 38:16, 39:17, 41:15, 63:20, 64:13, 77:8, 80:11, 80:25, 83:22, 87:14, 92:2, 93:16, 95:8, 110:21, 110:23, 112:15, 121:21, 139:15, 146:24, 147:1, 148:4, 150:16, 150:18, 150:19, 156:10, 161:25, 163:19, 164:3, 164:8, 164:11, 170:12, 178:12, 182:23, 202:11, 202:20, 211:1</p> <p><b>realm</b> [1] - 171:24</p> <p><b>reams</b> [2] - 17:6, 144:17</p> <p><b>reaped</b> [1] - 44:5</p> <p><b>reason</b> [19] - 42:25, 43:8, 50:16, 56:8, 95:14, 98:21, 109:20, 122:6, 122:20, 127:11, 131:21, 135:11, 155:20, 176:25, 185:7, 192:17,</p>
<b>R</b>				
<p><b>radical</b> [3] - 123:1, 123:9, 123:19</p> <p><b>raise</b> [6] - 20:25, 31:12, 54:14, 123:25, 157:3</p> <p><b>raised</b> [9] - 56:12, 60:23, 92:24, 100:22, 102:3, 123:21, 131:12, 134:11, 173:7</p> <p><b>raises</b> [2] - 85:22, 86:8</p> <p><b>raising</b> [1] - 27:2</p> <p><b>ramping</b> [1] - 160:23</p> <p><b>ran</b> [2] - 41:10, 169:13</p> <p><b>range</b> [1] - 201:14</p> <p><b>rank</b> [1] - 61:22</p> <p><b>rapid</b> [1] - 169:14</p> <p><b>rare</b> [1] - 55:4</p> <p><b>rate</b> [5] - 36:11, 89:5, 89:15, 124:8</p> <p><b>rather</b> [15] - 8:1, 11:19, 22:2, 23:8, 27:18, 28:25, 33:3, 36:6, 44:7, 45:11, 48:13, 116:13, 178:15, 179:15, 196:17</p> <p><b>rational</b> [1] - 143:23</p> <p><b>RDR</b> [1] - 211:24</p> <p><b>Re</b> [3] - 27:10, 39:3, 191:11</p> <p><b>re</b> [1] - 158:12</p> <p><b>re-evaluation</b> [1] - 158:12</p>				
<b>Q</b>				
<p><b>Q1</b> [4] - 103:17, 103:20, 103:21, 108:2</p> <p><b>Q2</b> [3] - 102:12, 187:9</p> <p><b>Q3</b> [2] - 113:6</p> <p><b>qualification</b> [3] - 200:19, 200:20, 204:10</p> <p><b>qualifications</b> [3] - 156:2, 204:4, 204:12</p> <p><b>qualified</b> [1] - 205:2</p>				

<p>197:11</p> <p><b>reasonable</b> [57] - 14:13, 38:11, 72:13, 82:13, 82:14, 99:23, 100:1, 100:9, 102:5, 102:17, 104:2, 108:5, 109:11, 109:13, 109:25, 110:4, 110:15, 114:5, 114:6, 121:23, 122:17, 123:8, 123:16, 124:11, 125:1, 126:4, 126:5, 126:19, 127:8, 127:17, 127:22, 128:14, 128:19, 128:22, 129:4, 129:17, 129:25, 131:22, 133:7, 133:18, 134:9, 134:18, 134:25, 135:10, 136:6, 136:13, 138:20, 163:21, 168:1, 168:8, 170:25, 171:24, 172:21, 173:18, 173:22, 188:16</p> <p><b>reasonably</b> [2] - 165:24, 201:14</p> <p><b>reasons</b> [17] - 18:9, 23:14, 29:23, 30:14, 30:17, 30:22, 44:24, 47:5, 49:17, 50:14, 76:4, 82:23, 129:25, 144:23, 188:1, 199:22</p> <p><b>rebuttal</b> [2] - 7:12, 8:10</p> <p><b>recap</b> [2] - 6:13, 6:22</p> <p><b>receipt</b> [1] - 141:20</p> <p><b>receive</b> [3] - 73:8, 75:19, 83:16</p> <p><b>received</b> [11] - 7:2, 64:15, 87:10, 87:25, 89:18, 90:3, 119:1, 140:10, 141:18, 142:8, 202:25</p> <p><b>receives</b> [1] - 89:23</p> <p><b>receiving</b> [2] - 89:21, 90:7</p> <p><b>recent</b> [2] - 26:13, 37:17</p> <p><b>recently</b> [2] - 43:1, 170:5</p> <p><b>Recess</b> [2] - 94:10, 161:18</p> <p><b>reckless</b> [4] - 130:1, 131:6, 133:6, 136:14</p>	<p><b>recklessly</b> [2] - 73:20, 110:16</p> <p><b>recklessness</b> [3] - 68:8, 68:9, 133:20</p> <p><b>recognize</b> [2] - 47:4, 200:5</p> <p><b>recognized</b> [6] - 10:19, 14:1, 22:1, 29:24, 110:14, 180:11</p> <p><b>recognizes</b> [1] - 21:12</p> <p><b>recognizing</b> [1] - 42:18</p> <p><b>recollection</b> [1] - 167:15</p> <p><b>recommend</b> [1] - 31:2</p> <p><b>recommendations</b> [2] - 31:3, 31:7</p> <p><b>record</b> [57] - 11:7, 17:20, 18:8, 25:15, 26:1, 28:6, 28:24, 29:16, 30:11, 31:5, 33:21, 35:9, 36:11, 39:25, 41:9, 62:7, 64:15, 66:12, 67:21, 68:23, 68:24, 76:19, 82:25, 83:1, 92:4, 92:11, 93:4, 94:23, 95:9, 95:11, 95:25, 96:5, 101:1, 107:12, 112:24, 115:10, 115:13, 115:22, 116:7, 118:4, 118:9, 128:8, 129:22, 130:17, 131:23, 133:21, 138:22, 143:6, 145:19, 146:8, 149:14, 153:23, 165:11, 177:8, 209:21, 210:2, 211:22</p> <p><b>record's</b> [1] - 104:16</p> <p><b>records</b> [7] - 21:21, 23:12, 48:15, 118:21, 118:23, 119:4</p> <p><b>recouped</b> [1] - 134:1</p> <p><b>red</b> [1] - 120:4</p> <p><b>reduce</b> [1] - 151:5</p> <p><b>reduced</b> [4] - 46:13, 156:15, 156:16, 156:17</p> <p><b>reductions</b> [1] - 156:18</p> <p><b>REED</b> [1] - 2:20</p> <p><b>Reed</b> [2] - 6:7, 65:3</p> <p><b>refer</b> [4] - 22:23, 55:14, 58:8, 145:2</p> <p><b>reference</b> [7] - 28:22, 55:24, 56:22,</p>	<p>109:20, 112:11, 171:11, 186:20</p> <p><b>referenced</b> [5] - 56:21, 86:14, 118:24, 156:24, 175:15</p> <p><b>referencing</b> [1] - 29:7</p> <p><b>referred</b> [6] - 22:22, 153:5, 160:14, 165:24, 196:21, 208:16</p> <p><b>referring</b> [6] - 56:15, 86:23, 116:2, 165:17, 167:14, 173:7</p> <p><b>refers</b> [3] - 27:20, 86:13, 110:12</p> <p><b>reflect</b> [4] - 32:2, 32:8, 150:23, 200:24</p> <p><b>reflected</b> [1] - 175:24</p> <p><b>reflecting</b> [1] - 208:4</p> <p><b>reflects</b> [3] - 17:20, 36:11, 151:2</p> <p><b>Reform</b> [2] - 35:21, 35:22</p> <p><b>refuge</b> [2] - 163:16, 183:7</p> <p><b>refuse</b> [1] - 178:23</p> <p><b>refused</b> [1] - 10:23</p> <p><b>refute</b> [1] - 35:8</p> <p><b>refuted</b> [1] - 41:17</p> <p><b>regard</b> [4] - 193:20, 195:4, 195:7, 197:10</p> <p><b>regarding</b> [30] - 10:8, 23:1, 34:12, 51:2, 51:5, 52:23, 57:10, 61:7, 64:9, 65:8, 67:14, 75:12, 130:10, 132:12, 133:1, 147:17, 147:18, 150:11, 155:22, 157:17, 158:20, 160:6, 192:14, 193:25, 194:4, 194:24, 202:16, 202:21, 203:11, 203:12</p> <p><b>regardless</b> [1] - 112:25</p> <p><b>regularly</b> [2] - 75:7, 131:24</p> <p><b>regulation</b> [1] - 42:1</p> <p><b>regulations</b> [4] - 39:24, 39:25, 40:1, 42:4</p> <p><b>regulators</b> [2] - 117:2, 117:5</p> <p><b>regulatory</b> [2] - 120:6, 160:1</p> <p><b>regurgitate</b> [1] - 22:24</p> <p><b>regurgitating</b> [1] -</p>	<p>28:12</p> <p><b>rehabilitate</b> [1] - 184:14</p> <p><b>Reilly</b> [1] - 203:19</p> <p><b>reimagine</b> [1] - 109:5</p> <p><b>reiterate</b> [2] - 72:15, 202:13</p> <p><b>reiterated</b> [1] - 15:25</p> <p><b>rejected</b> [10] - 12:12, 33:10, 55:14, 56:9, 60:14, 68:18, 184:2, 198:4, 205:7, 207:5</p> <p><b>relate</b> [3] - 39:6, 48:4, 48:7</p> <p><b>related</b> [20] - 9:7, 15:15, 24:19, 26:18, 35:18, 41:20, 105:6, 139:11, 141:8, 149:12, 152:12, 153:21, 156:4, 157:10, 157:14, 157:25, 158:25, 187:11, 196:17, 201:20</p> <p><b>relates</b> [5] - 28:19, 49:19, 131:11, 195:20, 203:2</p> <p><b>relations</b> [1] - 31:12</p> <p><b>relationship</b> [3] - 148:13, 152:21, 160:6</p> <p><b>relationships</b> [1] - 19:8</p> <p><b>relative</b> [1] - 103:2</p> <p><b>relatively</b> [2] - 77:25, 166:16</p> <p><b>release</b> [3] - 146:15, 151:9, 155:2</p> <p><b>released</b> [4] - 149:18, 151:4, 159:12, 159:16</p> <p><b>relevance</b> [2] - 25:11, 63:14</p> <p><b>relevant</b> [4] - 17:21, 51:12, 69:11, 76:24</p> <p><b>reliability</b> [5] - 200:19, 200:20, 201:4, 201:7, 205:8</p> <p><b>reliable</b> [4] - 202:9, 207:14, 210:5</p> <p><b>reliance</b> [1] - 180:6</p> <p><b>relied</b> [7] - 40:10, 40:19, 111:8, 111:17, 112:15, 117:15, 117:16</p> <p><b>relief</b> [7] - 178:15, 178:16, 178:21, 179:9, 189:15, 190:2, 190:11</p> <p><b>relies</b> [1] - 38:4</p>	<p><b>rely</b> [19] - 19:10, 20:2, 22:18, 23:8, 24:4, 26:8, 72:10, 72:12, 72:20, 72:23, 73:2, 74:3, 77:3, 84:21, 87:6, 87:9, 88:6, 88:25, 181:6</p> <p><b>relying</b> [2] - 173:14, 183:24</p> <p><b>Relying</b> [1] - 60:12</p> <p><b>remain</b> [2] - 8:22, 133:11</p> <p><b>remaining</b> [3] - 8:22, 10:6, 66:7</p> <p><b>remains</b> [1] - 34:16</p> <p><b>remarkable</b> [1] - 8:1</p> <p><b>remarks</b> [1] - 90:12</p> <p><b>remedial</b> [1] - 140:6</p> <p><b>remedied</b> [1] - 165:19</p> <p><b>remedy</b> [2] - 192:7, 205:22</p> <p><b>remember</b> [9] - 40:13, 56:11, 95:16, 99:24, 104:10, 106:5, 138:9, 188:23, 211:13</p> <p><b>remind</b> [1] - 81:25</p> <p><b>remotely</b> [1] - 5:1</p> <p><b>removal</b> [1] - 92:21</p> <p><b>remove</b> [1] - 153:11</p> <p><b>removed</b> [1] - 92:6</p> <p><b>removing</b> [1] - 92:19</p> <p><b>rendered</b> [1] - 12:18</p> <p><b>renders</b> [2] - 191:12, 191:13</p> <p><b>repeat</b> [3] - 29:21, 112:23, 206:10</p> <p><b>repeated</b> [2] - 90:9, 120:10</p> <p><b>repeatedly</b> [11] - 13:10, 79:19, 88:6, 122:7, 130:9, 133:15, 146:19, 148:16, 193:3, 197:24</p> <p><b>replace</b> [2] - 42:4, 155:23</p> <p><b>replete</b> [1] - 48:21</p> <p><b>reply</b> [6] - 100:23, 121:11, 123:17, 149:7, 150:9, 208:15</p> <p><b>report</b> [21] - 41:7, 41:8, 97:21, 106:2, 109:1, 117:19, 117:25, 121:11, 125:14, 142:18, 154:23, 158:10, 159:8, 187:8, 197:22, 198:12, 208:1, 208:4, 208:5,</p>
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<p>208:15, 210:4  <b>reported</b> [8] - 25:21, 34:23, 36:22, 41:6, 125:20, 159:3, 159:16, 159:20  <b>Reporter</b> [5] - 1:24, 21:20, 65:3, 163:2, 211:25  <b>reporter</b> [4] - 6:15, 6:19, 208:18, 210:25  <b>REPORTER'S</b> [1] - 211:19  <b>reporting</b> [5] - 61:1, 61:24, 62:4, 66:24, 103:10  <b>reports</b> [18] - 48:11, 75:19, 75:20, 114:16, 132:21, 149:15, 150:23, 152:19, 152:20, 160:22, 191:25, 192:6, 196:14, 197:15, 205:25, 206:17, 206:20, 210:1  <b>represent</b> [2] - 6:10, 174:13  <b>representations</b> [1] - 42:14  <b>representative</b> [6] - 17:11, 75:11, 106:25, 122:13, 172:24, 173:5  <b>represented</b> [5] - 79:14, 79:15, 79:17, 143:16, 156:1  <b>representing</b> [1] - 180:9  <b>request</b> [5] - 119:25, 120:1, 120:18, 179:8  <b>requested</b> [1] - 121:20  <b>require</b> [7] - 11:12, 37:4, 96:4, 104:24, 110:1, 200:16, 201:5  <b>required</b> [9] - 99:3, 121:3, 123:16, 123:21, 134:2, 135:13, 148:2, 148:5, 148:24  <b>requirement</b> [3] - 148:17, 154:18, 187:3  <b>requirements</b> [4] - 13:6, 61:24, 149:1, 200:18  <b>requires</b> [11] - 11:11, 14:10, 15:8, 43:9, 44:3, 101:10, 148:9, 188:18, 195:11, 201:7</p>	<p><b>requiring</b> [1] - 123:25  <b>research</b> [2] - 201:6, 204:6  <b>reset</b> [8] - 102:14, 102:19, 102:20, 102:21, 169:18, 184:20, 184:21, 184:22  <b>resided</b> [1] - 102:2  <b>resignation</b> [2] - 48:13, 154:16  <b>resigning</b> [1] - 48:12  <b>resolve</b> [3] - 27:9, 37:20, 97:5  <b>resolving</b> [1] - 101:22  <b>resonates</b> [1] - 69:15  <b>resorted</b> [1] - 146:16  <b>respect</b> [68] - 8:8, 8:24, 9:3, 9:14, 9:24, 10:5, 10:14, 10:20, 12:10, 17:3, 18:18, 20:22, 30:10, 36:1, 36:14, 40:1, 40:25, 42:19, 43:15, 44:20, 44:21, 46:17, 48:1, 48:2, 48:9, 50:5, 50:11, 51:19, 51:24, 57:17, 63:3, 64:6, 66:8, 66:9, 67:22, 68:24, 71:23, 72:22, 75:17, 82:22, 91:22, 105:10, 111:5, 127:19, 128:24, 133:20, 137:13, 157:12, 158:22, 163:12, 166:9, 166:11, 173:4, 174:5, 176:18, 177:2, 177:21, 181:13, 182:5, 185:1, 187:13, 190:1, 200:7, 200:11, 200:14, 203:6, 205:4  <b>respectfully</b> [3] - 71:18, 171:12, 174:17  <b>respective</b> [4] - 96:9, 117:10, 118:20, 185:22  <b>respects</b> [1] - 68:14  <b>respond</b> [1] - 189:12  <b>responded</b> [3] - 98:23, 105:7, 130:9  <b>responding</b> [2] - 21:3, 120:12  <b>response</b> [6] - 33:4, 55:22, 120:1, 160:11, 162:4, 201:19</p>	<p><b>responses</b> [2] - 120:18, 169:10  <b>responsibility</b> [1] - 27:14  <b>responsible</b> [1] - 145:9  <b>rest</b> [4] - 11:19, 11:24, 156:16, 201:8  <b>restate</b> [2] - 15:5, 90:15  <b>rested</b> [1] - 25:19  <b>restricted</b> [1] - 107:14  <b>rests</b> [1] - 44:7  <b>result</b> [7] - 71:4, 106:14, 126:12, 139:20, 142:6, 158:11, 160:1  <b>resulting</b> [2] - 118:10, 199:7  <b>results</b> [13] - 36:20, 49:13, 49:14, 49:15, 71:13, 87:24, 96:13, 106:6, 151:24, 156:13, 156:17, 188:1  <b>retire</b> [1] - 109:18  <b>Retirement</b> [1] - 37:21  <b>retrospective</b> [1] - 60:7  <b>revealed</b> [5] - 9:11, 48:13, 105:1, 156:22, 187:12  <b>reveals</b> [1] - 96:5  <b>revelatory</b> [1] - 157:4  <b>revenue</b> [10] - 39:23, 42:8, 54:18, 54:21, 90:24, 97:20, 97:22, 99:9, 165:9, 165:11  <b>revenues</b> [2] - 56:1, 104:9  <b>reverse</b> [1] - 180:5  <b>review</b> [10] - 26:10, 32:6, 39:10, 103:6, 103:7, 113:2, 113:3, 113:9, 132:17, 133:3  <b>reviewed</b> [5] - 30:24, 73:24, 113:10, 121:8, 132:25  <b>reviewing</b> [1] - 92:22  <b>reviews</b> [1] - 110:10  <b>rich</b> [1] - 174:9  <b>ridiculous</b> [2] - 164:12, 164:24  <b>rig</b> [1] - 96:7  <b>rigged</b> [3] - 115:3, 129:24, 135:22  <b>rigging</b> [4] - 26:18, 120:23, 136:2, 209:4  <b>rigorous</b> [1] - 13:7  <b>rise</b> [7] - 5:5, 39:6,</p>	<p>94:9, 94:11, 161:17, 161:19, 211:16  <b>rises</b> [1] - 123:1  <b>Risk</b> [1] - 60:12  <b>risk</b> [13] - 23:24, 62:5, 122:3, 124:11, 124:15, 125:2, 125:4, 130:14, 134:1, 140:19, 140:22, 160:4  <b>risks</b> [3] - 103:2, 170:4, 170:7  <b>rivals</b> [1] - 21:7  <b>road</b> [2] - 15:8, 124:2  <b>role</b> [5] - 100:12, 155:13, 156:2, 194:1, 201:12  <b>roll</b> [1] - 132:4  <b>Romain</b> [1] - 6:1  <b>ROMAIN</b> [1] - 2:15  <b>Ron</b> [2] - 62:3, 98:16  <b>roof</b> [1] - 174:21  <b>ROOFER'S</b> [1] - 1:3  <b>Roofers</b> [1] - 68:19  <b>room</b> [3] - 88:18, 135:14, 149:5  <b>rooms</b> [1] - 144:17  <b>Roseland</b> [1] - 1:19  <b>roughly</b> [2] - 94:22, 123:4  <b>routinely</b> [1] - 111:8  <b>Rowe</b> [1] - 6:5  <b>ROWE</b> [1] - 2:11  <b>rubber</b> [1] - 15:8  <b>Rudinger</b> [3] - 140:17, 140:20, 141:6  <b>Rule</b> [10] - 23:5, 69:25, 96:23, 117:13, 118:3, 120:4, 120:7, 188:18, 191:9, 200:16  <b>rule</b> [6] - 23:9, 70:2, 116:19, 120:4, 124:6, 162:1  <b>rules</b> [4] - 27:12, 104:24, 124:4, 165:11  <b>Rules</b> [1] - 23:11  <b>ruling</b> [1] - 35:16  <b>run</b> [4] - 48:18, 70:13, 101:4, 187:19  <b>rust</b> [1] - 148:20  <b>Rx</b> [23] - 10:2, 15:18, 15:24, 17:13, 18:20, 21:24, 29:2, 29:5, 30:23, 46:21, 49:15, 51:3, 51:16, 71:23, 79:16, 79:18, 80:15, 80:17, 156:18, 182:1, 196:23,</p>	<p>197:11  <b>S</b>  <b>S-A-N-D-O-Z</b> [1] - 27:5  <b>S-T-U-E-C-K</b> [1] - 27:15  <b>Sachs</b> [1] - 80:21  <b>safe</b> [1] - 35:22  <b>safeguards</b> [1] - 24:3  <b>salaries</b> [1] - 20:22  <b>sale</b> [2] - 71:8, 71:9  <b>sales</b> [11] - 24:21, 27:14, 29:3, 29:4, 29:5, 31:16, 69:7, 69:10, 105:7, 115:23  <b>salt</b> [1] - 124:2  <b>Salt</b> [1] - 32:17  <b>salvaged</b> [1] - 181:10  <b>Sam</b> [2] - 6:1, 7:22  <b>Samuel</b> [1] - 191:7  <b>SAMUEL</b> [1] - 2:16  <b>SANDLER</b> [1] - 1:17  <b>Sandler</b> [1] - 5:21  <b>Sandoz</b> [23] - 24:10, 27:5, 27:6, 27:13, 27:21, 28:3, 28:19, 52:17, 52:18, 114:25, 115:1, 115:2, 115:3, 115:11, 115:15, 115:23, 120:23, 135:16, 135:20, 180:25, 209:2  <b>Sandoz's</b> [3] - 115:14, 115:19, 129:23  <b>Sandoz-deferred</b> [1] - 52:18  <b>satisfied</b> [2] - 110:1, 194:7  <b>save</b> [8] - 26:12, 47:22, 179:25, 180:3, 180:10, 180:16, 180:22, 182:21  <b>saw</b> [10] - 47:2, 51:12, 55:2, 74:21, 96:8, 107:2, 151:4, 165:13, 178:21, 181:20  <b>scaling</b> [1] - 103:2  <b>scare</b> [1] - 146:17  <b>scattershot</b> [1] - 16:10  <b>scenario</b> [2] - 143:2, 150:7  <b>scene</b> [1] - 72:3  <b>scheme</b> [14] - 9:3, 9:7, 9:14, 22:7, 72:1, 75:21, 102:12, 112:5, 160:5,</p>
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<p>162:14, 162:17, 162:24, 162:25, 174:16</p> <p><b>schemes</b> [1] - 26:18</p> <p><b>Schneider</b> [1] - 192:9</p> <p><b>scienter</b> [44] - 8:4, 8:8, 9:6, 9:8, 10:8, 10:19, 10:20, 30:4, 30:6, 38:10, 42:19, 42:21, 43:4, 43:8, 43:10, 43:13, 51:11, 51:18, 64:16, 67:22, 68:21, 71:2, 71:17, 104:14, 108:19, 109:22, 109:23, 110:1, 110:4, 110:19, 110:21, 110:25, 111:5, 129:21, 130:8, 131:22, 133:20, 134:19, 136:9, 136:12, 181:13, 181:16, 186:23, 203:2</p> <p><b>scintilla</b> [3] - 65:23, 96:25, 138:23</p> <p><b>scope</b> [2] - 136:18, 192:1</p> <p><b>scoundrels</b> [2] - 163:17, 183:7</p> <p><b>scoured</b> [2] - 11:4, 11:5</p> <p><b>screen</b> [3] - 41:3, 41:4, 65:16</p> <p><b>scripted</b> [1] - 133:1</p> <p><b>scrutiny</b> [2] - 160:1, 204:5</p> <p><b>se</b> [2] - 23:2, 28:16</p> <p><b>search</b> [3] - 159:18, 159:22, 160:24</p> <p><b>searching</b> [1] - 159:23</p> <p><b>seated</b> [3] - 5:9, 94:12, 161:20</p> <p><b>SEC</b> [2] - 170:21, 193:16</p> <p><b>second</b> [18] - 10:6, 13:2, 14:23, 28:9, 35:10, 40:21, 62:3, 69:4, 99:15, 106:5, 117:13, 119:1, 120:19, 131:21, 137:20, 184:4, 192:22, 209:7</p> <p><b>secondly</b> [1] - 137:20</p> <p><b>seconds</b> [1] - 65:25</p> <p><b>secretary</b> [1] - 74:7</p> <p><b>section</b> [10] - 9:18, 64:3, 139:17, 143:15, 178:14, 178:19, 195:5, 195:7, 196:10</p>	<p><b>Securities</b> [6] - 35:21, 35:22, 139:17, 148:24, 172:11, 202:8</p> <p><b>securities</b> [20] - 33:22, 37:23, 39:7, 39:9, 39:14, 39:20, 57:19, 58:5, 66:14, 83:14, 111:24, 112:1, 140:23, 148:11, 150:14, 177:10, 177:11, 185:25, 193:14, 206:19</p> <p><b>security</b> [3] - 58:7, 83:18, 111:25</p> <p><b>sedan</b> [1] - 123:13</p> <p><b>see</b> [34] - 9:8, 18:13, 46:18, 47:11, 47:13, 56:2, 63:8, 63:10, 67:3, 67:6, 67:7, 69:6, 80:13, 81:25, 82:9, 83:23, 86:3, 87:19, 98:15, 104:19, 107:11, 123:2, 123:11, 123:12, 123:13, 131:8, 136:6, 151:11, 152:25, 155:6, 155:14, 171:23, 186:15, 189:2</p> <p><b>seek</b> [5] - 10:12, 24:8, 139:19, 149:3, 191:21</p> <p><b>seeking</b> [2] - 193:10, 205:21</p> <p><b>seeks</b> [1] - 116:22</p> <p><b>seem</b> [4] - 13:20, 55:6, 155:7, 186:14</p> <p><b>segment</b> [4] - 49:14, 81:12, 82:10, 128:13</p> <p><b>segments</b> [2] - 49:7, 80:12</p> <p><b>segregated</b> [1] - 49:16</p> <p><b>select</b> [1] - 114:3</p> <p><b>self</b> [3] - 32:15, 95:9, 186:5</p> <p><b>self-serving</b> [2] - 95:9, 186:5</p> <p><b>Sell</b> [1] - 107:14</p> <p><b>sell</b> [12] - 40:6, 40:7, 70:6, 83:18, 91:19, 107:8, 144:2, 164:13, 164:15, 164:22, 174:14, 174:19</p> <p><b>selling</b> [6] - 69:14, 163:23, 164:14, 164:16, 164:23, 173:24</p>	<p><b>sells</b> [2] - 70:10, 71:7</p> <p><b>Semerenko</b> [1] - 148:9</p> <p><b>sending</b> [1] - 182:16</p> <p><b>sends</b> [1] - 74:7</p> <p><b>senior</b> [2] - 53:24, 75:4</p> <p><b>sense</b> [16] - 21:8, 21:11, 36:25, 45:2, 78:2, 78:3, 119:9, 135:13, 146:24, 161:9, 161:13, 174:17, 176:12, 182:17, 202:24</p> <p><b>sensitivities</b> [1] - 97:22</p> <p><b>sent</b> [10] - 74:7, 98:7, 98:11, 99:14, 113:15, 114:16, 132:10, 132:12, 132:21, 185:11</p> <p><b>sentence</b> [3] - 81:18, 108:9, 128:2</p> <p><b>sentences</b> [1] - 128:1</p> <p><b>separate</b> [3] - 14:20, 64:3, 199:5</p> <p><b>September</b> [7] - 78:18, 91:2, 91:7, 104:8, 113:17, 114:16, 132:22</p> <p><b>sequence</b> [1] - 190:3</p> <p><b>serious</b> [6] - 37:9, 37:16, 42:16, 83:6, 88:22, 169:21</p> <p><b>served</b> [3] - 107:6, 168:12, 202:7</p> <p><b>serves</b> [1] - 96:23</p> <p><b>Services</b> [1] - 193:16</p> <p><b>serving</b> [2] - 95:9, 186:5</p> <p><b>set</b> [15] - 12:10, 16:23, 22:19, 23:13, 25:14, 27:21, 101:24, 117:19, 118:9, 119:23, 150:21, 175:25, 182:22, 194:23, 205:15</p> <p><b>sets</b> [2] - 118:5, 120:12</p> <p><b>settlement</b> [1] - 162:8</p> <p><b>settlements</b> [1] - 179:23</p> <p><b>seven</b> [8] - 12:14, 47:1, 149:17, 150:15, 151:15, 189:5, 189:10, 201:25</p> <p><b>Seventh</b> [4] - 37:18, 37:22, 38:9, 38:16</p> <p><b>several</b> [11] - 29:14, 72:10, 74:23, 80:16,</p>	<p>94:21, 105:9, 113:16, 152:4, 156:20, 204:12, 208:7</p> <p><b>severely</b> [2] - 98:12, 103:14</p> <p><b>shade</b> [1] - 39:12</p> <p><b>shape</b> [2] - 15:20, 188:11</p> <p><b>share</b> [27] - 32:10, 32:23, 44:22, 44:25, 45:2, 45:4, 45:17, 49:8, 49:15, 70:11, 71:9, 75:7, 121:15, 122:4, 127:14, 127:16, 141:14, 141:16, 142:13, 142:17, 144:2, 149:18, 174:9, 205:20, 208:11, 209:9</p> <p><b>shared</b> [1] - 86:15</p> <p><b>sharehold</b> [1] - 143:21</p> <p><b>shareholder</b> [1] - 140:14</p> <p><b>shareholders</b> [21] - 44:10, 45:12, 62:13, 71:5, 139:21, 141:12, 141:17, 141:21, 141:22, 142:5, 143:12, 144:5, 144:25, 152:9, 163:7, 174:13, 176:20, 176:21, 178:22, 179:6, 194:17</p> <p><b>shares</b> [35] - 44:10, 71:1, 71:4, 71:7, 71:10, 71:11, 107:8, 107:10, 107:11, 107:15, 138:6, 141:15, 141:18, 141:23, 141:24, 142:2, 142:5, 142:9, 142:12, 142:14, 143:8, 143:15, 143:23, 143:24, 144:2, 144:4, 144:14, 164:13, 173:24, 174:2, 174:10, 174:19, 178:23, 205:21, 205:23</p> <p><b>Sharkey</b> [1] - 97:1</p> <p><b>shave</b> [1] - 129:11</p> <p><b>shed</b> [1] - 38:22</p> <p><b>sheet</b> [3] - 47:3, 47:15, 180:4</p> <p><b>shepherding</b> [1] - 94:25</p>	<p><b>Sherman</b> [5] - 111:23, 111:24, 137:18, 177:3</p> <p><b>shifting</b> [1] - 65:18</p> <p><b>ship</b> [1] - 155:4</p> <p><b>Shkreli</b> [3] - 56:12, 131:11, 131:12</p> <p><b>Shkreli's</b> [1] - 163:14</p> <p><b>shocked</b> [2] - 76:23, 151:9</p> <p><b>shocking</b> [2] - 77:1, 81:3</p> <p><b>shoehorn</b> [1] - 16:9</p> <p><b>short</b> [8] - 65:8, 66:1, 68:20, 90:13, 93:3, 95:15, 161:10, 166:17</p> <p><b>shortage</b> [3] - 125:19, 125:21</p> <p><b>shortly</b> [1] - 10:25</p> <p><b>show</b> [27] - 9:22, 11:6, 34:16, 38:10, 44:2, 48:1, 67:3, 67:18, 68:6, 68:8, 79:12, 82:16, 84:25, 121:12, 122:5, 149:21, 160:15, 164:4, 165:18, 166:25, 177:9, 180:24, 187:8, 191:19, 198:20, 198:21</p> <p><b>showed</b> [9] - 9:22, 33:3, 104:8, 113:3, 113:15, 157:7, 165:13, 169:25, 208:25</p> <p><b>showing</b> [12] - 14:14, 108:16, 118:9, 119:12, 121:4, 132:23, 133:21, 143:6, 148:10, 149:11, 159:10, 204:12</p> <p><b>shown</b> [5] - 30:21, 78:17, 111:1, 111:7, 130:19</p> <p><b>shows</b> [20] - 11:6, 17:18, 17:21, 18:4, 59:22, 68:7, 68:24, 79:13, 79:22, 95:25, 112:12, 112:24, 114:19, 118:13, 121:9, 122:5, 131:23, 184:16, 187:8, 198:23</p> <p><b>SHRIVER</b> [1] - 2:14</p> <p><b>shut</b> [4] - 12:4, 16:17, 20:17, 182:11</p> <p><b>side</b> [7] - 111:5,</p>
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<p>136:20, 177:25, 178:1, 178:8, 206:8, 211:13</p> <p><b>sides</b> [2] - 110:8, 110:25</p> <p><b>sign</b> [2] - 54:5, 58:20</p> <p><b>sign-off</b> [1] - 54:5</p> <p><b>signals</b> [2] - 109:18, 152:11</p> <p><b>signed</b> [2] - 119:14, 138:11</p> <p><b>significance</b> [1] - 157:22</p> <p><b>significant</b> [10] - 37:19, 68:6, 71:16, 136:24, 149:22, 154:13, 160:10, 169:13, 171:7, 189:11</p> <p><b>significantly</b> [5] - 68:3, 73:19, 82:16, 151:25, 196:11</p> <p><b>signing</b> [1] - 63:3</p> <p><b>silence</b> [1] - 182:24</p> <p><b>silenced</b> [1] - 183:5</p> <p><b>silliest</b> [1] - 20:10</p> <p><b>silly</b> [4] - 17:18, 24:13, 58:25, 183:6</p> <p><b>SILVERMAN</b> [9] - 2:3, 4:7, 5:11, 64:25, 94:5, 94:14, 139:5, 183:3, 211:15</p> <p><b>Silverman</b> [16] - 5:12, 94:15, 139:14, 144:1, 147:8, 152:2, 157:6, 166:18, 167:5, 169:13, 172:7, 172:23, 173:16, 175:15, 177:2, 209:12</p> <p><b>similar</b> [12] - 8:7, 18:4, 31:7, 32:21, 38:7, 38:16, 126:6, 126:15, 193:6, 204:8</p> <p><b>Similarly</b> [1] - 1:4</p> <p><b>similarly</b> [4] - 39:12, 126:7, 199:8, 199:20</p> <p><b>simple</b> [2] - 21:11, 183:17</p> <p><b>simply</b> [9] - 9:21, 51:21, 52:1, 53:2, 57:6, 75:12, 138:24, 199:11, 202:23</p> <p><b>single</b> [9] - 21:5, 25:20, 33:25, 34:22, 74:4, 77:5, 124:19, 158:10, 185:19</p> <p><b>singularly</b> [1] - 88:14</p> <p><b>sins</b> [1] - 117:4</p> <p><b>site</b> [1] - 111:16</p>	<p><b>sites</b> [1] - 21:23</p> <p><b>sitting</b> [1] - 76:23</p> <p><b>Situated</b> [1] - 1:5</p> <p><b>situation</b> [10] - 64:17, 105:8, 124:13, 125:8, 125:17, 138:14, 140:24, 145:14, 187:23, 189:24</p> <p><b>situations</b> [2] - 54:11, 54:16</p> <p><b>six</b> [18] - 8:24, 9:15, 19:14, 25:4, 28:19, 30:21, 34:1, 59:14, 74:13, 79:4, 79:16, 100:3, 112:10, 132:12, 137:16, 163:23, 182:19, 201:25</p> <p><b>six-fold</b> [2] - 74:13, 132:12</p> <p><b>Sixth</b> [1] - 20:3</p> <p><b>size</b> [3] - 19:12, 19:14, 19:21</p> <p><b>skeptical</b> [1] - 9:12</p> <p><b>skill</b> [1] - 204:14</p> <p><b>skin</b> [1] - 159:4</p> <p><b>SKUs</b> [1] - 34:4</p> <p><b>slide</b> [64] - 26:25, 41:5, 47:8, 51:20, 51:25, 55:25, 57:15, 57:16, 60:20, 63:21, 66:11, 67:11, 67:24, 68:5, 69:24, 70:25, 71:25, 73:2, 73:9, 75:2, 75:10, 77:10, 77:20, 78:4, 78:17, 78:24, 79:15, 80:14, 81:21, 83:9, 83:10, 84:6, 85:2, 85:10, 85:20, 86:6, 87:7, 87:14, 87:15, 87:23, 88:7, 89:1, 89:17, 89:18, 90:5, 90:15, 90:21, 91:1, 91:6, 91:12, 91:25, 92:17, 136:18, 170:2, 170:11, 171:5, 171:14, 172:5</p> <p><b>slides</b> [17] - 50:21, 72:20, 73:8, 78:24, 88:1, 89:16, 90:11, 91:22, 92:6, 92:17, 92:20, 92:22, 93:1, 93:2, 113:9, 130:23</p> <p><b>slight</b> [1] - 127:25</p> <p><b>slightly</b> [9] - 80:2, 80:8, 80:20, 82:3, 82:12, 127:22, 128:14, 171:11,</p>	<p>207:23</p> <p><b>small</b> [3] - 18:14, 29:6, 130:22</p> <p><b>smart</b> [2] - 45:21, 151:3</p> <p><b>smile</b> [1] - 61:24</p> <p><b>SMITH</b> [1] - 2:11</p> <p><b>Smith</b> [1] - 6:5</p> <p><b>smoking</b> [5] - 11:17, 11:18, 15:10, 16:16, 110:1</p> <p><b>smoothly</b> [6] - 57:23, 99:21, 101:23, 102:8, 102:20, 186:15</p> <p><b>sneak</b> [2] - 39:1, 40:12</p> <p><b>so-called</b> [12] - 9:12, 14:19, 37:3, 43:25, 44:19, 48:24, 127:18, 129:5, 136:7, 178:1, 180:6, 191:22</p> <p><b>social</b> [5] - 16:12, 17:12, 18:3, 19:7, 20:6</p> <p><b>Solar</b> [1] - 203:19</p> <p><b>sold</b> [11] - 14:9, 28:5, 31:19, 34:4, 62:14, 63:11, 70:25, 71:10, 138:6, 164:10, 174:2</p> <p><b>Solemnized</b> [1] - 15:10</p> <p><b>solemnized</b> [1] - 11:13</p> <p><b>someday</b> [1] - 181:13</p> <p><b>someone</b> [4] - 74:15, 74:18, 74:20, 132:4</p> <p><b>someplace</b> [1] - 41:10</p> <p><b>sometimes</b> [10] - 7:24, 18:20, 54:12, 54:13, 65:11, 123:11, 134:2, 173:2, 183:21</p> <p><b>somewhat</b> [1] - 30:3</p> <p><b>soon</b> [3] - 109:18, 132:20, 211:8</p> <p><b>sorry</b> [7] - 73:13, 74:14, 85:16, 85:25, 126:25, 133:17, 145:4</p> <p><b>sort</b> [10] - 29:10, 54:14, 54:21, 55:13, 88:13, 90:12, 137:19, 151:13, 162:7, 162:21</p> <p><b>sorts</b> [1] - 76:4</p> <p><b>sought</b> [2] - 107:8, 179:4</p> <p><b>sound</b> [2] - 62:22, 179:2</p> <p><b>sounded</b> [2] - 95:4,</p>	<p>95:24</p> <p><b>sounds</b> [2] - 78:11, 179:2</p> <p><b>South</b> [1] - 2:12</p> <p><b>Southern</b> [1] - 58:9</p> <p><b>southern</b> [1] - 179:7</p> <p><b>SOX</b> [1] - 62:6</p> <p><b>space</b> [2] - 61:15, 77:24</p> <p><b>spades</b> [1] - 49:21</p> <p><b>spanning</b> [2] - 34:18, 201:24</p> <p><b>spare</b> [2] - 91:14, 152:23</p> <p><b>Spartan</b> [1] - 179:24</p> <p><b>spartan</b> [1] - 35:8</p> <p><b>speakers</b> [1] - 28:23</p> <p><b>speaking</b> [7] - 15:20, 25:23, 42:11, 104:5, 162:12, 168:5, 172:11</p> <p><b>speaks</b> [2] - 62:2, 101:17</p> <p><b>specialized</b> [2] - 13:5, 191:16</p> <p><b>specialty</b> [1] - 66:18</p> <p><b>specific</b> [21] - 16:22, 17:13, 35:23, 75:8, 77:17, 79:16, 82:9, 82:10, 128:10, 128:12, 130:12, 151:7, 155:19, 156:25, 168:13, 169:2, 171:12, 205:18</p> <p><b>specifically</b> [13] - 12:12, 29:24, 36:7, 40:17, 127:11, 140:20, 149:16, 152:1, 153:20, 167:20, 194:13, 198:4, 208:14</p> <p><b>specificity</b> [1] - 32:19</p> <p><b>specifics</b> [3] - 22:10, 87:3, 202:14</p> <p><b>specified</b> [2] - 8:25, 11:21</p> <p><b>speculate</b> [2] - 17:16, 45:5</p> <p><b>speculating</b> [1] - 192:5</p> <p><b>speculation</b> [13] - 12:1, 19:23, 37:11, 48:21, 65:23, 72:4, 141:1, 145:23, 146:1, 162:6, 173:22, 192:6, 199:7</p> <p><b>speculations</b> [1] - 182:23</p> <p><b>speculative</b> [10] -</p>	<p>25:18, 44:2, 44:5, 44:15, 47:16, 47:18, 141:2, 141:3, 142:22</p> <p><b>spell</b> [1] - 127:1</p> <p><b>spend</b> [2] - 55:21, 169:8</p> <p><b>spent</b> [6] - 20:14, 34:13, 95:3, 104:18, 138:1, 184:13</p> <p><b>spherical</b> [1] - 209:23</p> <p><b>spike</b> [1] - 112:16</p> <p><b>spiked</b> [1] - 187:9</p> <p><b>spikes</b> [2] - 126:18, 127:22</p> <p><b>spiking</b> [1] - 127:23</p> <p><b>Spill</b> [1] - 27:10</p> <p><b>spin</b> [8] - 96:18, 108:8, 108:11, 121:24, 126:21, 128:3, 188:14, 191:21</p> <p><b>spots</b> [1] - 192:25</p> <p><b>spread</b> [1] - 142:20</p> <p><b>spun</b> [1] - 97:13</p> <p><b>SPX</b> [1] - 192:17</p> <p><b>squarely</b> [1] - 23:3</p> <p><b>squeeze</b> [1] - 179:22</p> <p><b>Squibb</b> [2] - 110:8, 186:24</p> <p><b>St</b> [1] - 6:1</p> <p><b>ST</b> [1] - 2:15</p> <p><b>stack</b> [1] - 84:17</p> <p><b>staff</b> [4] - 99:8, 166:10, 210:16, 210:22</p> <p><b>stage</b> [26] - 16:16, 16:17, 16:18, 26:24, 33:23, 33:24, 40:16, 58:18, 99:25, 101:9, 102:18, 104:14, 107:21, 110:21, 110:23, 114:2, 130:17, 175:8, 178:15, 179:12, 185:9, 187:1, 201:12</p> <p><b>Stage</b> [1] - 23:25</p> <p><b>stand</b> [2] - 36:17, 173:8</p> <p><b>stand-alone</b> [1] - 36:17</p> <p><b>standard</b> [36] - 33:7, 44:1, 46:7, 65:21, 65:22, 65:24, 82:14, 82:15, 93:8, 93:15, 109:6, 110:6, 110:11, 110:13, 110:17, 149:4, 161:1, 161:6, 171:2, 186:25, 187:3, 193:22, 193:24, 194:1, 194:5, 194:6,</p>
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<p>194:9, 194:14, 194:15, 194:20, 201:7, 201:15, 203:13, 204:1 <b>standards</b> [6] - 68:10, 109:2, 191:19, 203:11, 203:12, 203:18 <b>stands</b> [1] - 24:17 <b>Stanley</b> [1] - 91:7 <b>star</b> [1] - 186:3 <b>stark</b> [1] - 134:22 <b>starred</b> [1] - 110:10 <b>start</b> [9] - 43:19, 58:22, 85:14, 139:8, 139:9, 151:21, 170:17, 201:16 <b>started</b> [7] - 5:8, 29:7, 66:2, 68:13, 112:13, 139:10, 156:20 <b>starting</b> [4] - 7:7, 39:17, 51:16, 163:4 <b>starving</b> [1] - 188:6 <b>state</b> [35] - 18:25, 22:19, 38:14, 72:16, 116:3, 116:6, 116:10, 117:7, 118:16, 118:19, 118:22, 119:9, 119:13, 119:15, 119:18, 119:21, 119:23, 120:19, 120:22, 146:2, 146:4, 146:6, 147:18, 147:22, 151:22, 176:10, 177:18, 181:8, 181:21, 192:5, 192:11, 192:13, 202:16, 202:21, 202:22 <b>State</b> [12] - 22:23, 22:25, 23:8, 23:9, 23:15, 24:7, 24:14, 24:19, 25:7, 26:6, 46:6, 52:14 <b>State's</b> [1] - 124:3 <b>statement</b> [65] - 27:20, 27:22, 34:1, 47:4, 49:11, 55:24, 55:25, 56:4, 56:6, 56:8, 56:21, 56:23, 57:10, 57:16, 57:17, 57:20, 58:4, 60:4, 60:5, 60:13, 60:18, 61:6, 61:12, 61:14, 61:16, 61:17, 61:21, 62:8, 64:7, 64:9, 66:21, 80:7, 82:8, 82:17, 85:1, 85:25, 88:4,</p>	<p>89:1, 89:2, 89:20, 89:25, 91:1, 91:2, 91:20, 93:7, 98:14, 100:3, 100:10, 108:11, 110:17, 117:20, 131:18, 133:4, 133:5, 145:25, 146:18, 148:21, 165:16, 166:21, 167:24, 177:22, 192:24, 193:13, 193:15 <b>statements</b> [97] - 10:24, 23:12, 23:22, 27:2, 28:13, 28:16, 28:21, 33:13, 33:15, 33:19, 33:20, 33:22, 35:20, 36:1, 36:4, 36:9, 36:14, 37:13, 38:3, 38:4, 38:6, 38:8, 38:17, 39:6, 39:21, 40:10, 41:16, 43:11, 43:13, 48:8, 48:14, 48:16, 49:6, 50:2, 50:3, 51:8, 51:9, 54:24, 54:25, 55:3, 55:5, 58:9, 66:8, 66:9, 66:14, 67:12, 67:14, 67:16, 67:23, 69:15, 69:19, 71:20, 73:11, 77:9, 77:15, 77:21, 79:11, 83:4, 84:9, 84:20, 84:22, 85:18, 94:22, 99:12, 99:18, 99:21, 100:12, 108:7, 111:11, 115:16, 129:13, 130:2, 131:23, 133:21, 136:14, 136:19, 138:7, 139:12, 140:11, 153:23, 156:23, 160:7, 160:8, 163:9, 163:10, 165:15, 178:24, 179:7, 180:2, 181:10, 192:23, 193:4, 193:5, 203:8, 209:21 <b>States</b> [13] - 5:2, 5:3, 9:17, 22:25, 40:8, 62:15, 89:9, 89:13, 121:7, 171:16, 176:21, 176:23, 196:21 <b>STATES</b> [2] - 1:1, 1:14 <b>states</b> [5] - 27:18, 59:2, 118:20, 137:8, 186:6 <b>statistical</b> [2] -</p>	<p>149:24, 154:11 <b>statistically</b> [4] - 149:21, 154:12, 160:10, 189:11 <b>statistics</b> [1] - 150:4 <b>statues</b> [1] - 145:7 <b>statute</b> [6] - 29:20, 140:1, 140:7, 145:8, 189:19 <b>stave</b> [1] - 19:11 <b>stay</b> [2] - 16:1, 113:7 <b>stays</b> [1] - 29:12 <b>Steamfitters</b> [1] - 39:16 <b>stems</b> [1] - 204:16 <b>step</b> [3] - 31:16, 65:6, 191:12 <b>stepping</b> [2] - 72:15, 159:23 <b>steps</b> [2] - 69:21, 74:18 <b>sterile</b> [1] - 209:24 <b>Stewart</b> [1] - 86:13 <b>stick</b> [5] - 124:18, 132:4, 155:3, 155:8, 155:9 <b>still</b> [8] - 20:15, 69:5, 78:7, 78:13, 80:18, 118:1, 163:12, 184:2 <b>stock</b> [34] - 49:12, 49:21, 49:23, 69:3, 69:7, 69:10, 69:14, 69:17, 70:10, 70:14, 149:24, 150:20, 152:15, 153:3, 153:7, 154:13, 155:10, 155:21, 156:25, 158:18, 159:11, 159:15, 160:9, 164:10, 164:13, 174:20, 174:24, 175:4, 188:25, 189:3, 197:3, 206:15, 206:24 <b>stocks</b> [1] - 148:14 <b>stop</b> [1] - 69:21 <b>stopped</b> [1] - 174:18 <b>stories</b> [1] - 185:15 <b>story</b> [4] - 40:22, 64:13, 96:19, 153:18 <b>straightforward</b> [1] - 195:21 <b>strained</b> [3] - 136:5, 183:10, 184:25 <b>strap</b> [1] - 26:5 <b>strategies</b> [2] - 29:1, 33:4 <b>strategy</b> [9] - 13:12, 81:10, 111:19,</p>	<p>127:19, 128:21, 130:6, 137:14, 181:10 <b>streams</b> [1] - 61:8 <b>Street</b> [7] - 1:11, 2:17, 3:4, 109:14, 109:17, 159:16, 159:20 <b>stretch</b> [2] - 73:4, 104:20 <b>stretching</b> [1] - 105:20 <b>stripped</b> [1] - 182:22 <b>strong</b> [9] - 11:22, 13:3, 13:14, 58:4, 65:10, 68:8, 110:5, 110:12, 136:12 <b>stronger</b> [1] - 11:15 <b>structural</b> [2] - 208:7, 210:12 <b>structure</b> [5] - 126:15, 135:8, 201:18, 205:6, 210:10 <b>structured</b> [1] - 126:7 <b>struggled</b> [1] - 79:9 <b>struggling</b> [1] - 73:14 <b>stubborn</b> [4] - 70:21, 71:20, 174:18, 174:21 <b>stuck</b> [2] - 17:1, 132:5 <b>studied</b> [4] - 30:24, 49:15, 151:3, 198:12 <b>studies</b> [3] - 149:20, 160:9, 204:25 <b>study</b> [4] - 45:24, 135:6, 150:3, 196:12 <b>Stueck</b> [6] - 27:15, 27:23, 28:1, 28:4, 28:11, 28:15 <b>Stueck's</b> [2] - 27:15, 28:9 <b>stuff</b> [4] - 49:22, 88:15, 165:17, 185:10 <b>stuffing</b> [1] - 106:10 <b>stupid</b> [1] - 180:20 <b>subject</b> [11] - 48:4, 48:7, 139:9, 154:16, 156:12, 191:16, 193:9, 196:1, 196:2, 204:21, 209:19 <b>subjects</b> [2] - 48:25, 205:3 <b>submit</b> [3] - 71:18, 171:13, 174:17 <b>submitted</b> [1] - 52:16 <b>submitting</b> [1] - 24:9 <b>subpoena</b> [1] - 180:24 <b>Subramanian</b> [1] - 146:7 <b>Subraminian</b> [1] - 145:24</p>	<p><b>subsequent</b> [2] - 148:11, 199:16 <b>subsidiary</b> [1] - 59:11 <b>substance</b> [3] - 24:20, 33:15, 183:14 <b>substantial</b> [5] - 148:10, 148:13, 198:14, 198:18, 208:17 <b>substantially</b> [3] - 8:20, 82:23, 156:14 <b>substantiate</b> [1] - 42:16 <b>substantiating</b> [1] - 40:1 <b>substantive</b> [3] - 27:16, 110:13 <b>substitute</b> [1] - 181:8 <b>succeed</b> [1] - 144:24 <b>succeeded</b> [4] - 141:16, 144:9, 144:24, 179:15 <b>succeeding</b> [1] - 144:11 <b>success</b> [6] - 10:8, 35:19, 37:14, 51:5, 67:14, 130:23 <b>Success</b> [1] - 62:4 <b>successful</b> [6] - 43:21, 139:16, 142:4, 170:5, 189:24, 195:13 <b>successor</b> [2] - 156:2, 156:3 <b>successes</b> [1] - 166:11 <b>suffered</b> [1] - 141:12 <b>sufficient</b> [6] - 16:23, 68:1, 136:10, 160:18, 177:16, 206:4 <b>sufficiently</b> [1] - 10:20 <b>suggest</b> [11] - 22:11, 25:17, 65:19, 66:20, 67:5, 68:21, 74:21, 92:16, 159:22, 167:11, 198:2 <b>suggested</b> [7] - 10:4, 30:24, 56:24, 92:19, 97:20, 170:13, 183:23 <b>suggesting</b> [6] - 56:23, 83:5, 102:1, 120:2, 145:21, 167:5 <b>suggestion</b> [2] - 48:17, 138:23 <b>suggestions</b> [1] - 11:10 <b>suggestive</b> [2] - 20:20, 202:22</p>
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<p><b>suggests</b> [3] - 54:4, 126:3, 198:15</p> <p><b>Suite</b> [1] - 41:6</p> <p><b>Sullivan</b> [5] - 6:10, 8:7, 20:23, 20:24, 36:7</p> <p><b>SULLIVAN</b> [1] - 3:2</p> <p><b>sum</b> [4] - 20:4, 22:10, 57:3, 64:11</p> <p><b>summarize</b> [1] - 49:10</p> <p><b>summarizes</b> [1] - 34:23</p> <p><b>summary</b> [53] - 6:22, 6:24, 6:25, 7:8, 7:10, 8:11, 16:3, 19:4, 19:11, 27:2, 27:25, 28:14, 33:23, 34:13, 50:16, 53:19, 55:23, 65:24, 68:1, 81:2, 93:15, 96:22, 97:3, 108:13, 115:9, 115:13, 116:7, 116:10, 116:11, 116:14, 117:22, 128:17, 128:18, 140:20, 149:5, 149:8, 150:8, 150:22, 153:18, 161:2, 162:4, 171:1, 175:8, 177:4, 179:12, 179:18, 181:1, 184:18, 185:24, 187:1, 188:8, 200:8, 200:23</p> <p><b>SUMMARY</b> [1] - 4:3</p> <p><b>summation</b> [1] - 95:5</p> <p><b>summer</b> [2] - 92:7, 133:14</p> <p><b>super</b> [5] - 111:17, 112:2, 112:16, 114:20, 114:23</p> <p><b>superstar</b> [1] - 189:8</p> <p><b>Supp</b> [1] - 118:14</p> <p><b>supplement</b> [1] - 91:16</p> <p><b>supplementation</b> [1] - 91:13</p> <p><b>supplemented</b> [1] - 91:3</p> <p><b>suppliers</b> [3] - 42:5, 42:10</p> <p><b>Supply</b> [1] - 110:15</p> <p><b>supply</b> [6] - 31:9, 42:5, 42:8, 125:18, 125:19, 125:21</p> <p><b>support</b> [11] - 12:7, 16:23, 19:6, 27:11, 37:11, 84:21, 146:8, 150:22, 159:23, 177:1, 209:5</p>	<p><b>supported</b> [4] - 68:25, 129:22, 130:8, 201:5</p> <p><b>supporting</b> [5] - 20:5, 72:13, 97:1, 149:15, 186:7</p> <p><b>supports</b> [3] - 62:8, 140:17, 148:25</p> <p><b>supposed</b> [17] - 9:3, 12:24, 25:17, 28:2, 28:9, 39:22, 42:3, 45:7, 46:15, 73:15, 74:23, 125:19, 178:12, 180:1, 192:7, 196:2, 197:7</p> <p><b>supposedly</b> [2] - 25:23, 196:9</p> <p><b>supposition</b> [6] - 11:25, 37:11, 42:21, 43:24, 162:3, 162:6</p> <p><b>Supreme</b> [7] - 12:5, 43:17, 111:2, 178:13, 194:13, 194:14, 194:16</p> <p><b>surely</b> [1] - 162:8</p> <p><b>surpassed</b> [1] - 9:7</p> <p><b>surprise</b> [2] - 21:25, 37:15</p> <p><b>surprised</b> [2] - 98:15, 189:7</p> <p><b>surprising</b> [1] - 189:11</p> <p><b>survival</b> [1] - 16:10</p> <p><b>survive</b> [4] - 27:2, 177:4, 181:5, 181:16</p> <p><b>survived</b> [1] - 182:10</p> <p><b>surviving</b> [3] - 27:24, 35:10, 51:1</p> <p><b>suspensions</b> [1] - 68:1</p> <p><b>suspicious</b> [1] - 74:22</p> <p><b>sustain</b> [3] - 33:22, 47:19, 173:10</p> <p><b>sustainability</b> [2] - 114:8, 131:1</p> <p><b>sustainable</b> [8] - 130:21, 172:7, 172:12, 172:13, 172:14, 172:20, 183:19, 183:24</p> <p><b>sustained</b> [1] - 40:18</p> <p><b>sweeping</b> [2] - 129:16, 159:6</p> <p><b>swell</b> [1] - 100:8</p> <p><b>switching</b> [1] - 42:9</p> <p><b>sworn</b> [1] - 18:13</p> <p><b>synergies</b> [4] - 39:23, 42:8, 42:9, 84:3</p> <p><b>synergy</b> [1] - 84:2</p> <p><b>synthesize</b> [1] - 211:10</p> <p><b>system</b> [1] - 59:10</p>	<p><b>systemic</b> [1] - 83:22</p> <p><b>Systems</b> [1] - 37:21</p> <p><b>systems</b> [1] - 57:24</p>	<p><b>T</b></p> <p><b>table</b> [5] - 6:17, 137:5, 137:6, 177:25, 210:14</p> <p><b>tacit</b> [1] - 122:4</p> <p><b>tactics</b> [2] - 32:3, 146:17</p> <p><b>tag</b> [1] - 8:17</p> <p><b>tag-a-long</b> [1] - 8:17</p> <p><b>tailwind</b> [1] - 132:19</p> <p><b>takeover</b> [4] - 104:12, 104:24</p> <p><b>talkers</b> [1] - 211:1</p> <p><b>talks</b> [1] - 170:17</p> <p><b>tantrum</b> [5] - 63:14, 63:16, 90:17, 166:7</p> <p><b>tantrums</b> [1] - 87:1</p> <p><b>taught</b> [1] - 196:3</p> <p><b>tax</b> [1] - 71:1</p> <p><b>Taylor</b> [1] - 37:21</p> <p><b>team</b> [12] - 78:5, 78:9, 78:12, 78:20, 85:6, 86:3, 87:20, 129:11, 130:21, 130:24, 134:16, 172:16</p> <p><b>teams</b> [1] - 40:4</p> <p><b>technical</b> [1] - 176:18</p> <p><b>technically</b> [1] - 112:6</p> <p><b>Technology</b> [1] - 37:22</p> <p><b>temper</b> [3] - 87:1, 90:17</p> <p><b>temporal</b> [1] - 127:10</p> <p><b>temporarily</b> [1] - 187:6</p> <p><b>ten</b> [5] - 58:22, 123:6, 164:13, 167:9, 190:25</p> <p><b>tender</b> [90] - 43:21, 44:6, 44:10, 44:18, 45:15, 45:22, 68:16, 68:25, 70:17, 71:6, 107:6, 107:22, 138:4, 138:7, 138:17, 139:11, 139:13, 139:15, 139:18, 139:22, 139:23, 140:8, 140:12, 140:15, 141:9, 141:13, 141:14, 141:16, 141:19, 141:20, 141:22, 142:3, 142:7, 142:9, 142:10, 142:12, 142:20, 143:3,</p>	<p>143:6, 143:14, 143:18, 143:24, 144:6, 144:8, 144:11, 144:13, 144:23, 144:24, 145:6, 145:23, 146:1, 146:13, 147:6, 147:14, 154:20, 174:3, 174:5, 174:8, 174:12, 174:20, 178:19, 178:21, 178:23, 179:14, 189:20, 190:2, 195:9, 195:11, 195:12, 195:15, 195:19, 195:22, 195:23, 195:25, 196:4, 196:7, 201:19, 204:11, 204:17, 204:22, 204:23, 205:5, 205:6, 205:14, 205:19, 205:23, 205:24, 206:2, 206:4</p> <p><b>tendered</b> [7] - 141:17, 142:3, 142:5, 142:14, 143:8, 143:17, 205:20</p> <p><b>tens</b> [2] - 124:19, 137:4</p> <p><b>tenth</b> [1] - 71:10</p> <p><b>term</b> [6] - 39:8, 58:7, 91:6, 110:20, 184:21, 207:25</p> <p><b>terms</b> [10] - 6:18, 7:3, 71:16, 94:8, 112:9, 112:11, 156:11, 170:4, 184:20, 211:12</p> <p><b>territory</b> [1] - 184:17</p> <p><b>test</b> [2] - 83:8, 93:11</p> <p><b>testified</b> [22] - 15:23, 17:11, 17:14, 25:22, 46:18, 70:19, 74:8, 79:5, 79:19, 86:22, 87:3, 88:13, 90:21, 92:21, 119:16, 122:14, 133:25, 134:4, 180:8, 195:24, 196:3, 202:7</p> <p><b>testifies</b> [1] - 147:18</p> <p><b>testify</b> [13] - 28:16, 115:18, 115:20, 116:14, 122:12, 146:4, 146:6, 146:7, 147:21, 181:3, 193:18, 195:22, 205:3</p> <p><b>testifying</b> [1] - 202:21</p>	<p><b>testimony</b> [46] - 6:23, 18:13, 20:4, 40:3, 41:17, 42:13, 47:3, 47:7, 47:10, 47:18, 47:21, 54:3, 54:9, 62:18, 75:5, 76:13, 86:22, 86:24, 107:12, 145:19, 147:20, 147:21, 180:5, 191:8, 191:14, 191:24, 192:2, 192:10, 192:15, 192:18, 193:6, 193:12, 193:21, 193:25, 194:22, 199:9, 199:24, 200:12, 200:15, 201:13, 202:9, 203:4, 203:6, 203:23, 204:8, 210:2</p> <p><b>testing</b> [1] - 126:13</p> <p><b>text</b> [3] - 109:15, 109:20, 118:21</p> <p><b>thankfully</b> [1] - 171:15</p> <p><b>thanking</b> [2] - 7:25, 170:17</p> <p><b>THE</b> [41] - 1:1, 1:14, 5:5, 5:7, 5:23, 6:3, 6:6, 6:12, 7:15, 7:17, 35:4, 50:20, 50:23, 64:20, 64:22, 93:22, 94:6, 94:9, 94:11, 94:12, 139:3, 151:20, 161:14, 161:17, 161:19, 161:20, 166:15, 175:12, 183:1, 188:21, 190:17, 190:20, 190:22, 191:1, 191:4, 191:6, 200:1, 210:18, 210:20, 211:3, 211:16</p> <p><b>theirs</b> [1] - 185:17</p> <p><b>themselves</b> [6] - 65:12, 130:4, 138:6, 142:15, 146:13, 207:19</p> <p><b>then-present</b> [1] - 10:9</p> <p><b>theories</b> [9] - 8:22, 34:22, 51:1, 66:3, 66:4, 66:5, 66:7, 67:10, 182:9</p> <p><b>theory</b> [17] - 8:22, 10:6, 10:19, 12:13, 20:6, 28:18, 29:1, 33:8, 35:10, 44:7, 44:23, 79:7, 83:8, 161:23, 177:1,</p>
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---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------



<p>189:22, 198:5  <b>therefore</b> [4] - 147:4,  164:22, 165:12,  202:18  <b>therein</b> [1] - 46:7  <b>they've</b> [2] - 53:16,  183:16  <b>thinking</b> [1] - 175:6  <b>thinks</b> [4] - 190:7,  198:21, 198:22,  198:24  <b>third</b> [6] - 14:24, 15:3,  15:7, 16:4, 132:19,  133:17  <b>Third</b> [58] - 2:4, 10:17,  10:23, 12:3, 12:12,  12:19, 13:17, 14:1,  14:9, 14:18, 16:2,  16:18, 16:20, 18:24,  19:3, 19:19, 21:7,  21:12, 31:25, 32:19,  33:1, 42:22, 43:3,  43:7, 60:14, 68:9,  68:11, 96:23,  101:10, 108:14,  110:10, 116:18,  117:23, 121:1,  122:23, 122:25,  124:8, 124:13,  124:14, 125:8,  128:23, 148:9,  181:12, 181:18,  182:4, 184:17,  184:18, 185:25,  186:3, 186:4,  188:15, 191:11,  191:18, 197:24,  198:4, 198:6,  198:19, 198:24  <b>third-plus</b> [2] - 15:3,  15:7  <b>THOMAS</b> [1] - 2:3  <b>Thomas</b> [5] - 5:16,  86:9, 88:8, 88:12  <b>Thomassy</b> [10] -  24:11, 24:13, 24:14,  24:16, 25:2, 27:4,  115:25, 116:2,  119:20, 120:23  <b>Thomassy's</b> [1] - 26:5  <b>thorny</b> [1] - 101:21  <b>thousand</b> [1] - 74:18  <b>thousands</b> [1] -  211:10  <b>three</b> [30] - 7:14, 8:4,  8:13, 12:15, 17:21,  17:22, 19:22, 24:10,  49:17, 76:15, 76:16,  91:8, 103:13,  106:16, 111:15,</p>	<p>111:19, 111:22,  112:9, 113:2,  118:15, 122:18,  127:3, 135:18,  156:8, 168:8,  170:22, 200:14,  200:18, 200:21  <b>three-day</b> [1] - 113:2  <b>three-paragraph</b> [1] -  24:10  <b>three-year</b> [1] - 17:21  <b>threshold</b> [1] - 205:24  <b>threw</b> [1] - 170:12  <b>throughout</b> [4] -  89:11, 146:21,  188:7, 200:3  <b>thrown</b> [1] - 111:6  <b>Thursday</b> [1] - 1:12  <b>TI</b> [1] - 23:6  <b>ticks</b> [1] - 159:10  <b>tie</b> [3] - 57:7, 64:17,  176:11  <b>timeline</b> [1] - 69:22  <b>timing</b> [4] - 58:12,  60:2, 166:21, 190:3  <b>tiny</b> [4] - 100:8,  122:24, 136:21  <b>tired</b> [1] - 90:19  <b>title</b> [1] - 86:10  <b>toast</b> [1] - 19:3  <b>today</b> [32] - 7:23,  22:24, 39:11, 56:2,  67:19, 69:1, 69:6,  69:7, 79:23, 80:4,  82:1, 84:24, 86:14,  94:7, 94:8, 94:20,  143:10, 144:12,  150:17, 151:6,  151:10, 160:17,  164:19, 175:9,  177:9, 177:24,  181:20, 200:3,  204:7, 207:8,  210:15, 211:6  <b>today's</b> [1] - 179:20  <b>Todd</b> [1] - 117:16  <b>together</b> [8] - 7:8,  58:16, 58:19, 84:2,  136:11, 146:25,  166:3, 166:9  <b>tolling</b> [1] - 29:20  <b>tom</b> [1] - 136:18  <b>Tom</b> [5] - 62:18, 93:2,  108:20, 115:10  <b>tons</b> [1] - 110:25  <b>Tony</b> [2] - 24:22,  115:25  <b>took</b> [14] - 18:8, 24:25,  25:3, 31:16, 69:21,  76:21, 119:24,</p>	<p>120:20, 124:12,  125:1, 181:6, 192:8,  208:23, 209:1  <b>top</b> [4] - 31:21, 36:23,  60:22  <b>top-line</b> [2] - 36:23  <b>topic</b> [1] - 15:16  <b>topical</b> [11] - 8:25,  11:21, 12:10, 13:3,  18:20, 21:24, 34:10,  44:20, 126:10,  182:1, 208:6  <b>topicals</b> [1] - 208:2  <b>topics</b> [6] - 60:22,  96:17, 131:5, 192:1,  192:21, 197:1  <b>torture</b> [1] - 179:22  <b>Tose</b> [1] - 18:25  <b>total</b> [15] - 29:4, 46:10,  46:11, 71:9, 71:10,  80:1, 80:5, 80:7,  80:9, 80:19, 80:23,  82:2, 82:7, 83:16,  176:12  <b>totally</b> [10] - 12:22,  25:1, 54:25, 55:3,  55:5, 62:8, 150:14,  164:1, 186:24,  203:17  <b>touch</b> [1] - 207:6  <b>touched</b> [2] - 60:2,  202:14  <b>touches</b> [1] - 49:22  <b>tough</b> [1] - 13:21  <b>touting</b> [1] - 58:10  <b>toward</b> [1] - 22:16  <b>towards</b> [1] - 39:18  <b>track</b> [3] - 13:22,  21:21, 22:5  <b>tracks</b> [1] - 139:25  <b>trade</b> [5] - 16:11,  17:18, 17:21, 18:4,  20:6  <b>traded</b> [2] - 142:9,  142:12  <b>trades</b> [1] - 71:15  <b>trading</b> [10] - 69:20,  69:21, 69:25, 70:15,  70:16, 70:22, 71:13,  159:3, 159:10, 178:6  <b>traditional</b> [2] - 14:25,  15:9  <b>transaction</b> [12] -  11:1, 36:12, 37:1,  37:6, 37:7, 43:24,  57:20, 58:1, 60:17,  145:17, 152:8,  201:24  <b>transactions</b> [1] -  144:16</p>	<p><b>transcript</b> [4] - 172:9,  172:25, 189:2,  211:21  <b>transcripts</b> [1] - 11:4  <b>transition</b> [1] - 211:4  <b>translate</b> [1] - 162:19  <b>transmittal</b> [2] - 132:9,  133:4  <b>transparent</b> [2] -  105:12, 105:13  <b>transsection</b> [1] -  44:14  <b>treasury</b> [1] - 62:5  <b>treated</b> [2] - 59:13,  196:13  <b>treatments</b> [2] - 31:11,  159:5  <b>triable</b> [2] - 34:16,  82:5  <b>trial</b> [26] - 28:15,  28:16, 35:8, 65:20,  78:1, 81:19, 95:5,  95:19, 97:12,  108:12, 110:13,  115:9, 115:12,  115:18, 115:20,  116:13, 116:16,  116:21, 116:23,  128:17, 130:16,  138:19, 149:11,  185:8, 186:25,  203:24  <b>trials</b> [1] - 96:21  <b>tried</b> [4] - 55:13, 63:7,  109:5, 167:11  <b>trier</b> [2] - 109:25,  147:7  <b>tries</b> [1] - 50:1  <b>trigger</b> [1] - 70:9  <b>triggers</b> [1] - 54:14  <b>trivial</b> [2] - 96:2,  194:17  <b>trouble</b> [2] - 6:20,  48:19  <b>troubled</b> [1] - 75:16  <b>troubling</b> [3] - 77:8,  83:19, 83:20  <b>true</b> [31] - 10:24, 12:7,  24:15, 27:22, 33:21,  33:22, 36:15, 38:18,  42:13, 54:6, 77:13,  87:21, 89:15, 90:1,  90:2, 91:20, 100:13,  104:15, 118:3,  137:22, 143:4,  149:10, 158:7,  164:5, 167:24,  168:7, 168:24,  206:16  <b>trust</b> [3] - 9:18, 22:20,</p>	<p>102:24  <b>trustworthiness</b> [4] -  23:24, 118:7,  119:11, 119:15  <b>trustworthy</b> [4] -  23:14, 23:22, 24:8,  119:13  <b>truth</b> [27] - 36:14,  40:23, 41:25, 45:2,  45:12, 45:18, 47:20,  77:4, 81:17, 101:18,  104:2, 107:5,  109:14, 112:8,  117:6, 122:13,  131:5, 133:12,  137:24, 138:16,  145:4, 145:5,  147:14, 150:19,  151:11, 160:14,  196:9  <b>truth-on-the-market</b>  [1] - 160:14  <b>truthful</b> [1] - 88:3  <b>truths</b> [1] - 146:16  <b>try</b> [23] - 16:8, 19:10,  23:8, 27:1, 45:10,  47:6, 50:9, 50:25,  53:3, 53:16, 109:9,  135:6, 162:7, 163:4,  166:16, 174:14,  180:18, 184:14,  190:24, 200:4,  206:9, 206:22, 211:7  <b>try-to-haves</b> [1] -  109:9  <b>trying</b> [16] - 10:15,  53:15, 53:18, 53:19,  54:2, 55:6, 58:19,  65:19, 71:22, 78:11,  81:5, 95:1, 138:3,  167:12, 181:24,  197:21  <b>TSC</b> [1] - 194:12  <b>tuned</b> [1] - 195:25  <b>turn</b> [18] - 22:15,  35:10, 37:11, 43:23,  50:17, 79:21, 81:1,  81:7, 83:9, 91:24,  113:7, 113:11,  126:23, 139:1,  154:17, 161:10,  196:10, 197:9  <b>turned</b> [2] - 96:15,  148:20  <b>turning</b> [1] - 79:8  <b>Tweed</b> [1] - 20:21  <b>twice</b> [2] - 12:14,  24:12  <b>two</b> [61] - 8:22, 9:10,  11:5, 15:4, 50:25,</p>
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<p>53:11, 53:12, 60:22, 60:23, 61:11, 62:9, 66:6, 67:10, 68:14, 72:21, 76:12, 76:14, 84:12, 84:18, 91:8, 95:3, 95:4, 101:25, 103:24, 106:18, 108:9, 111:18, 115:1, 123:17, 126:15, 127:16, 134:23, 136:15, 136:22, 136:23, 143:22, 155:5, 155:25, 156:3, 158:2, 158:21, 158:23, 158:24, 160:11, 160:16, 167:24, 168:1, 170:22, 172:18, 173:25, 176:19, 180:8, 180:25, 182:14, 182:17, 187:11, 195:11, 195:14</p> <p><b>two-and-a-half</b> [2] - 11:5, 95:4</p> <p><b>type</b> [11] - 13:12, 15:3, 33:3, 33:9, 37:5, 46:11, 48:21, 117:14, 197:17, 209:14, 209:16</p> <p><b>types</b> [1] - 156:11</p> <p><b>typical</b> [1] - 14:7</p>	<p><b>unchanged</b> [1] - 133:12</p> <p><b>uncharged</b> [1] - 177:6</p> <p><b>under</b> [51] - 8:15, 11:14, 23:5, 23:10, 23:15, 25:22, 35:20, 35:23, 38:11, 40:22, 41:17, 41:22, 43:23, 44:16, 49:1, 49:2, 59:9, 59:11, 71:1, 109:23, 111:7, 118:3, 120:7, 120:14, 123:15, 124:15, 137:18, 140:5, 148:24, 165:11, 165:12, 171:1, 174:12, 178:14, 180:8, 180:24, 187:2, 189:16, 189:18, 191:13, 197:6, 199:12, 200:8, 200:16, 203:25, 204:5, 205:8, 207:4, 210:8</p> <p><b>under-oath</b> [1] - 41:17</p> <p><b>undercut</b> [6] - 21:16, 122:21, 124:8, 125:10, 125:24, 126:1</p> <p><b>undercuts</b> [2] - 63:16, 174:22</p> <p><b>undercutting</b> [2] - 28:18, 32:22</p> <p><b>underlying</b> [4] - 55:2, 55:4, 109:20, 137:23</p> <p><b>undermine</b> [1] - 22:4</p> <p><b>undermines</b> [2] - 22:3, 100:21</p> <p><b>undermining</b> [2] - 129:20, 138:7</p> <p><b>underperformance</b> [3] - 50:2, 50:4, 187:4</p> <p><b>understood</b> [4] - 17:1, 77:23, 112:24, 125:2</p> <p><b>undisciplined</b> [2] - 165:2, 183:8</p> <p><b>undisputed</b> [5] - 53:23, 53:24, 75:3, 97:8, 117:21</p> <p><b>undoubtedly</b> [3] - 189:7, 201:25, 205:2</p> <p><b>unequivocally</b> [2] - 15:19, 161:5</p> <p><b>unilateral</b> [2] - 21:17, 32:1</p> <p><b>unintentionally</b> [1] - 172:6</p> <p><b>Union</b> [1] - 39:24</p> <p><b>unique</b> [1] - 124:5</p>	<p><b>unit</b> [12] - 29:2, 29:5, 29:6, 32:7, 75:4, 103:6, 105:7, 105:8, 112:20, 112:23, 124:24, 137:15</p> <p><b>United</b> [17] - 5:2, 5:3, 9:17, 26:10, 26:13, 26:15, 26:16, 26:23, 40:8, 62:15, 89:9, 89:13, 121:7, 171:15, 176:21, 176:23, 196:21</p> <p><b>UNITED</b> [2] - 1:1, 1:14</p> <p><b>units</b> [2] - 66:24, 75:20</p> <p><b>universe</b> [1] - 209:24</p> <p><b>unknown</b> [3] - 28:11, 28:12, 132:14</p> <p><b>unlawful</b> [3] - 20:19, 177:3, 199:5</p> <p><b>unless</b> [6] - 109:24, 118:6, 118:12, 151:8, 151:16, 161:9</p> <p><b>unlike</b> [5] - 12:22, 15:2, 29:15, 56:21, 57:11</p> <p><b>unlikely</b> [1] - 151:17</p> <p><b>unmentioned</b> [1] - 97:15</p> <p><b>unnatural</b> [1] - 97:13</p> <p><b>unnoticed</b> [1] - 134:20</p> <p><b>unprecedented</b> [1] - 180:4</p> <p><b>unpredictable</b> [1] - 84:14</p> <p><b>unprofitable</b> [1] - 132:2</p> <p><b>unquestionable</b> [1] - 128:20</p> <p><b>unreasonable</b> [3] - 97:14, 111:13, 164:2</p> <p><b>unreasonableness</b> [1] - 171:19</p> <p><b>unrelated</b> [7] - 18:10, 25:1, 49:7, 153:10, 158:3, 196:16, 206:12</p> <p><b>unreliable</b> [6] - 24:7, 191:13, 197:12, 198:11, 200:16, 203:25</p> <p><b>unsalable</b> [1] - 204:7</p> <p><b>unscramble</b> [1] - 145:15</p> <p><b>unsolicited</b> [1] - 70:12</p> <p><b>unspecified</b> [1] - 86:8</p> <p><b>unsurprising</b> [1] - 196:6</p> <p><b>unsurprisingly</b> [3] - 155:7, 160:1, 176:6</p>	<p><b>unsustainable</b> [8] - 111:17, 112:2, 112:11, 112:25, 114:23, 131:16, 132:24, 183:25</p> <p><b>untoward</b> [1] - 53:16</p> <p><b>untrue</b> [3] - 20:18, 33:15, 72:9</p> <p><b>untrustworthy</b> [1] - 118:13</p> <p><b>unusual</b> [6] - 21:4, 59:17, 63:14, 69:10, 101:12, 124:4</p> <p><b>up</b> [81] - 11:3, 11:8, 12:3, 12:4, 16:17, 20:17, 41:3, 41:4, 41:24, 47:7, 47:8, 50:22, 51:15, 53:4, 54:17, 54:21, 57:3, 64:11, 64:22, 64:25, 65:22, 66:11, 66:16, 70:14, 73:2, 73:18, 74:13, 76:18, 77:10, 78:2, 80:3, 80:8, 80:19, 81:1, 81:5, 82:3, 82:4, 82:12, 82:17, 84:17, 85:21, 88:5, 90:5, 93:7, 93:24, 111:14, 113:20, 115:11, 119:9, 121:15, 122:12, 123:11, 127:11, 127:22, 128:14, 130:22, 136:18, 143:2, 143:15, 155:18, 159:23, 160:23, 162:17, 162:18, 164:4, 166:22, 169:12, 171:5, 171:11, 173:8, 174:13, 174:21, 174:23, 180:24, 182:11, 207:23</p> <p><b>update</b> [1] - 113:17</p> <p><b>upfront</b> [1] - 134:1</p> <p><b>upheld</b> [1] - 136:24</p> <p><b>uphold</b> [1] - 199:9</p> <p><b>upholding</b> [1] - 189:16</p> <p><b>upset</b> [4] - 63:1, 121:21, 129:8, 166:7</p> <p><b>upsetting</b> [1] - 122:3</p> <p><b>upside</b> [2] - 80:16, 80:17</p> <p><b>uptick</b> [1] - 123:2</p> <p><b>urge</b> [4] - 51:15, 87:8, 167:10, 169:21</p> <p><b>uses</b> [1] - 172:14</p> <p><b>usual</b> [2] - 14:12, 69:7</p> <p><b>Utesch</b> [1] - 55:14</p>	<p><b>V</b></p> <p><b>Valeant</b> [5] - 48:18, 88:20, 154:6, 155:6, 196:15</p> <p><b>valerate</b> [1] - 127:6</p> <p><b>valid</b> [1] - 91:24</p> <p><b>Valspar</b> [29] - 11:14, 12:17, 12:18, 12:20, 13:18, 14:2, 14:8, 14:10, 15:5, 16:1, 16:18, 19:19, 22:1, 22:9, 32:19, 32:22, 33:1, 33:10, 121:1, 122:23, 122:24, 123:4, 124:9, 124:14, 124:15, 182:6, 198:3, 198:7, 198:19</p> <p><b>valuable</b> [1] - 48:18</p> <p><b>valuation</b> [1] - 158:15</p> <p><b>value</b> [12] - 36:17, 37:19, 141:15, 144:3, 147:22, 147:24, 148:12, 148:15, 151:5, 152:2, 152:5, 152:9</p> <p><b>valued</b> [2] - 141:14, 141:25</p> <p><b>vanilla</b> [1] - 54:25</p> <p><b>variation</b> [1] - 43:7</p> <p><b>various</b> [3] - 22:19, 40:4, 74:9</p> <p><b>vastly</b> [1] - 187:23</p> <p><b>ventures</b> [1] - 18:19</p> <p><b>verbally</b> [1] - 92:24</p> <p><b>verified</b> [1] - 120:10</p> <p><b>verify</b> [1] - 185:11</p> <p><b>version</b> [3] - 40:23, 125:4, 191:22</p> <p><b>versus</b> [1] - 57:14</p> <p><b>vested</b> [1] - 107:14</p> <p><b>vesting</b> [1] - 71:1</p> <p><b>viability</b> [1] - 46:16</p> <p><b>vice</b> [6] - 75:5, 98:16, 99:13, 103:13, 108:1, 124:22</p> <p><b>view</b> [7] - 46:14, 80:19, 80:20, 123:8, 171:25, 182:4, 200:2</p> <p><b>viewing</b> [1] - 109:24</p> <p><b>vigorous</b> [1] - 198:16</p> <p><b>VINS</b> [1] - 118:14</p> <p><b>violate</b> [2] - 145:7, 145:8</p> <p><b>violated</b> [2] - 140:23, 190:5</p> <p><b>violation</b> [6] - 111:23, 111:25, 123:23, 140:18, 140:24,</p>
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<p>143:14  <b>violations</b> [2] - 22:20, 139:17  <b>virtually</b> [3] - 119:13, 136:24, 158:19  <b>wise</b> [1] - 53:24  <b>visit</b> [1] - 186:1  <b>Vivint</b> [1] - 203:19  <b>volume</b> [1] - 31:16  <b>voluntarily</b> [1] - 75:17  <b>VSI</b> [1] - 192:17</p>	<p><b>Washington</b> [1] - 2:17  <b>wasteful</b> [1] - 182:11  <b>waters</b> [1] - 93:12  <b>Watson</b> [4] - 168:11, 168:20, 168:22, 168:25  <b>ways</b> [2] - 116:23, 182:2  <b>wayside</b> [1] - 66:4  <b>weak</b> [1] - 24:9  <b>weaker</b> [1] - 158:1  <b>weaker-than-expected</b> [1] - 158:1  <b>weakness</b> [1] - 29:24  <b>wealthy</b> [1] - 69:1  <b>websites</b> [1] - 21:23  <b>weed</b> [1] - 162:5  <b>weeds</b> [2] - 196:1, 196:2  <b>week</b> [5] - 74:23, 105:17, 105:24, 175:3, 175:4  <b>weekend</b> [1] - 109:21  <b>weekly</b> [3] - 85:13, 85:17, 105:9  <b>weeks</b> [12] - 17:22, 57:21, 58:1, 59:14, 60:17, 61:5, 61:11, 79:4, 102:10, 103:24, 104:6, 186:1  <b>weigh</b> [2] - 97:5, 188:18  <b>weighed</b> [5] - 22:25, 95:10, 97:12, 109:22, 187:2  <b>weighs</b> [1] - 152:21  <b>weight</b> [2] - 202:11, 202:12  <b>well-accepted</b> [1] - 197:6  <b>well-developed</b> [1] - 33:21  <b>well-supported</b> [1] - 129:22  <b>Wesolowski</b> [9] - 25:20, 25:21, 31:4, 31:5, 53:24, 54:3, 54:10, 121:14, 134:4  <b>Westlaw</b> [5] - 26:14, 39:5, 39:15, 39:17, 68:19  <b>Wettre</b> [4] - 7:25, 9:11, 29:11, 94:24  <b>WETTRE</b> [1] - 5:3  <b>whack</b> [1] - 182:7  <b>whatsoever</b> [4] - 11:13, 44:12, 52:2, 101:7  <b>whereas</b> [2] - 96:24, 177:12</p>	<p><b>white</b> [1] - 148:22  <b>whole</b> [4] - 38:22, 39:13, 164:14, 198:17  <b>wholly</b> [6] - 44:2, 44:5, 44:15, 47:16, 47:18  <b>wide</b> [5] - 33:6, 79:20, 81:11, 181:10, 201:9  <b>widely</b> [1] - 9:9  <b>wildly</b> [1] - 40:22  <b>William</b> [1] - 191:20  <b>Williams</b> [2] - 139:11, 145:14  <b>Williamson</b> [5] - 12:5, 199:8, 199:14, 210:9, 210:12  <b>win</b> [3] - 82:15, 121:16, 161:2  <b>windfall</b> [3] - 96:12, 113:4, 135:9  <b>windfalls</b> [2] - 131:2, 131:3  <b>window</b> [1] - 92:15  <b>Winowiecki</b> [8] - 59:8, 62:3, 63:22, 98:16, 98:24, 99:14, 103:13, 107:17  <b>Winowiecki's</b> [1] - 105:4  <b>wipe</b> [1] - 90:8  <b>wish</b> [3] - 39:8, 80:25, 172:4  <b>wished</b> [2] - 29:9, 182:13  <b>withdrawn</b> [2] - 45:6, 46:14  <b>withheld</b> [4] - 45:2, 108:18, 162:23, 190:12  <b>withstand</b> [1] - 177:17  <b>witness</b> [12] - 24:18, 106:25, 115:9, 115:12, 115:18, 115:20, 122:12, 122:14, 134:10, 173:8, 180:6, 185:8  <b>witnessed</b> [2] - 46:24, 47:2  <b>witnesses</b> [7] - 15:18, 59:8, 119:15, 120:10, 180:23, 180:24, 199:24  <b>WM</b> [1] - 24:4  <b>woefully</b> [1] - 68:20  <b>Wojciechowski</b> [1] - 201:7  <b>woman</b> [1] - 40:14  <b>wondering</b> [1] - 61:20  <b>Wood</b> [1] - 2:12  <b>Woodbridge</b> [1] - 2:12</p>	<p><b>word</b> [11] - 79:21, 106:10, 109:19, 110:24, 127:5, 136:25, 172:14, 180:12, 185:19, 202:23, 203:1  <b>words</b> [33] - 33:15, 38:6, 47:6, 73:4, 73:7, 81:7, 81:9, 81:13, 95:8, 98:17, 99:2, 99:4, 101:24, 108:3, 109:7, 109:12, 128:4, 128:5, 128:7, 128:11, 128:15, 128:20, 128:21, 129:18, 134:6, 134:17, 166:25, 167:1, 170:16, 172:10, 172:22, 180:11, 206:14  <b>wore</b> [2] - 100:14  <b>works</b> [3] - 27:4, 59:15, 79:7  <b>world</b> [7] - 72:2, 72:17, 73:15, 73:18, 77:18, 123:10, 195:16  <b>worldwide</b> [1] - 67:2  <b>worried</b> [2] - 63:10, 181:20  <b>worry</b> [1] - 30:12  <b>worse</b> [4] - 104:22, 108:7, 113:16, 133:16  <b>worsened</b> [1] - 104:9  <b>worsening</b> [2] - 133:14, 154:9  <b>worth</b> [5] - 44:25, 45:1, 45:17, 152:7, 178:2  <b>worthless</b> [1] - 152:10  <b>worthy</b> [3] - 84:18, 84:19, 120:11  <b>wow</b> [1] - 180:19  <b>write</b> [2] - 74:21, 96:5  <b>write-down</b> [1] - 96:5  <b>writes</b> [2] - 74:5, 101:25  <b>writing</b> [1] - 185:11  <b>written</b> [3] - 31:10, 31:15, 102:20  <b>wrongdoing</b> [5] - 72:18, 76:5, 95:10, 111:10, 169:20  <b>wrote</b> [10] - 30:2, 62:25, 95:8, 96:1, 105:17, 105:21, 121:6, 164:21, 177:14, 182:15</p>	<p><b>X</b></p> <p><b>XAVIER</b> [2] - 1:14, 5:2  <b>Xavier</b> [1] - 5:6</p> <p><b>Y</b></p> <p><b>year</b> [4] - 17:21, 59:4, 85:23, 151:24  <b>years</b> [25] - 9:10, 12:15, 25:3, 25:4, 25:24, 25:25, 26:12, 26:19, 26:20, 29:8, 29:13, 34:18, 47:1, 56:11, 57:7, 66:17, 80:16, 91:9, 170:23, 173:19, 181:4, 181:15, 182:10, 202:1, 211:6  <b>York</b> [12] - 2:4, 2:9, 2:22, 3:4, 31:21, 58:9, 122:9, 179:8  <b>Young</b> [4] - 104:22, 106:22, 106:25, 107:1  <b>yourself</b> [1] - 6:14</p> <p><b>Z</b></p> <p><b>Zamichieli</b> [1] - 186:2  <b>zebra</b> [1] - 37:22  <b>Zebra</b> [2] - 38:2, 38:7  <b>zero</b> [5] - 39:25, 75:14, 76:10, 86:3, 127:15  <b>Zoloff</b> [1] - 191:11</p>
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